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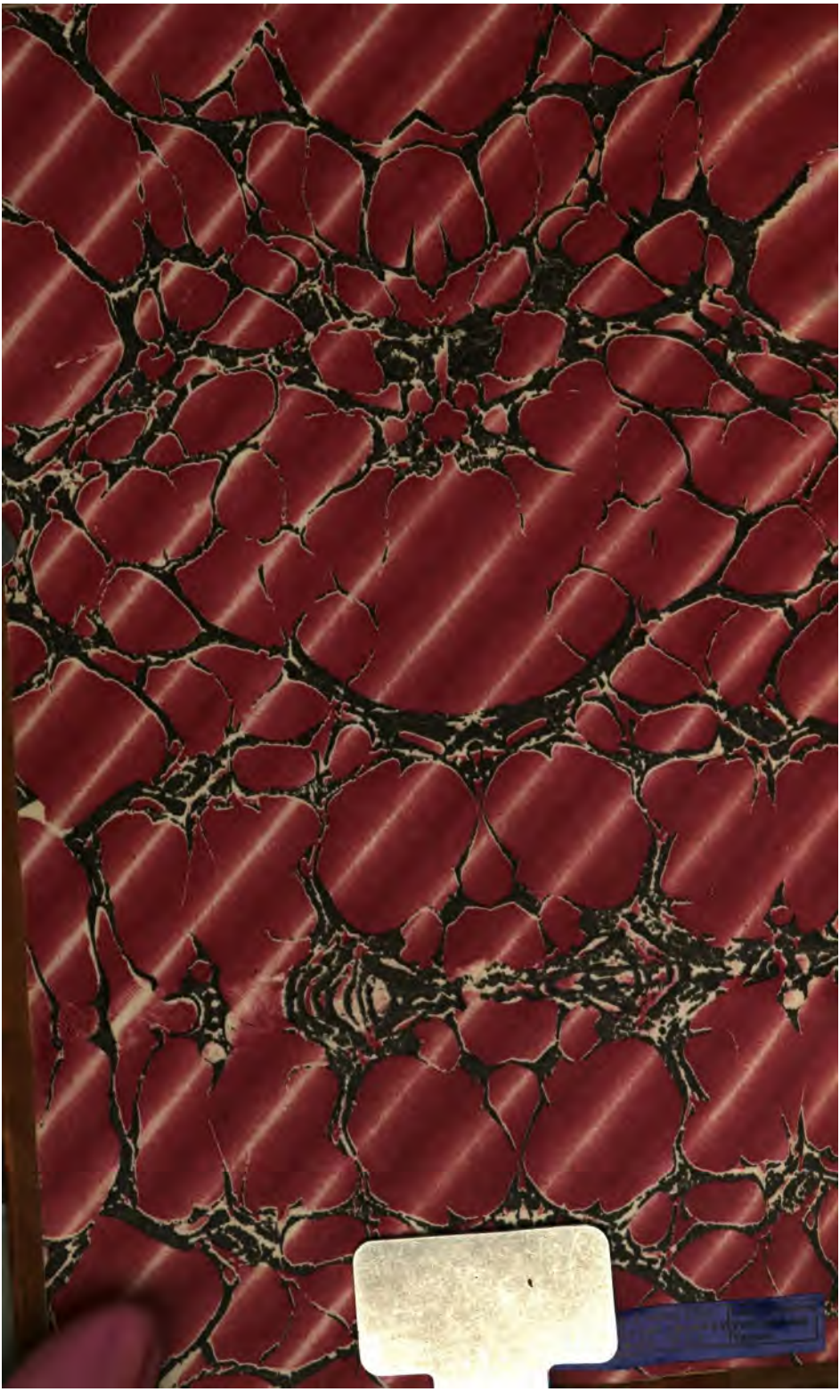

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A

TREATISE

ON

COPYHOLDS.

By CHARLES WATKINS, Esq.
OF THE MIDDLE TEMPLE.
Author of an Essay on the Law of Descents, &c.

V. 1

LONDON:
PRINTED FOR R. PHENEY,
INNER TEMPLE-LANE,
1797.

TO

THE HONOURABLE

Sir FRANCIS BULLER, Bart.

ONE OF THE JUSTICES OF

HIS MAJESTY'S COURT OF COMMON PLEAS,

THE FOLLOWING

TREATISE ON COPYHOLDS

IS,

(WITH PERMISSION)

MOST RESPECTFULLY INSCRIBED,

BY

HIS OBLIGED AND

OBEDIENT SERVANT,

CHARLES WATKINS.

MIDDLE TEMPLE;
MICHAELMAS TERM, 1797.

PREFACE.

WHEN a Treatiſe on the Subject of Copyholds is ſo generally declared to be wanted, an apology for the publication of a Treatiſe on the Subject of Copyholds cannot be requiſite. A Treatiſe on that Subject is, therefore, thus preſented to the world.

If what is perfect cannot be attained, it can be no reaſon why that which is uſeful ſhould not be attempted. The Author has taken ſome pains to make the following Treatiſe uſeful; but it muſt not be expected that he has made it perfect. If his labours have not produced what has been wiſhed, they may, at leaſt, ſhorten, in ſome meaſure, the labours of others, and aſſiſt ſome one, bleſſed with better powers than himſelf and with circumſtances more propitious, to give to the profeſſion a Treatiſe more complete.

He has, where the ſubject would admit of it, been brief: for a multiplication of words

is too often a multiplication of doubts and difficulties. In his references he has been frequent: and he hopes correct; that if errors have eſcaped him (and whom have they not eſcaped?) they may be detected. In order to prevent miſconception, he has generally given the writer he has cited in the writer's own words; though, at the ſame time, he has carefully directed the reader where the paſſage may be found. Nor has he been ſo faſtidious as to reject a form of expreſſion which he himſelf had adopted, when, in ſome prior publication, he had occaſion to treat on the ſubject immediately before him, merely becauſe it had already occured.

He has generally alſo contented himſelf with barely referring to the publiſhed reports of caſes. For had he given thoſe reports at length (which might have been done without any great *mental* exertion) he ſhould only have made the reader pay once more for what perhaps he had paid half a dozen times already: and even if he had given them at length, the books themſelves muſt have been reſorted to at laſt. A few caſes, indeed, are given

given at length: but that was becauſe thoſe caſes were *not* before in print; and which, therefore, perhaps conſtitute the moſt important part of his work: and for thoſe caſes he is chiefly indebted to the friendſhip of Mr. BUTLER.

He has endeavoured to extract ſomething at leaſt like conſiſtency from the crude maſs of matter which the books afford. He has even endeavoured to reconcile the jarring and diſcordant caſes on ſeveral points which he had to conſider; but this, he muſt confeſs, ſometimes appeared to be rather out of the reach of the powers uſually allotted to humanity; and which he, conſequently, could only lament. He has endeavoured alſo to reduce ſome caſes to acknowledged principles, and to reſcue others from the clouds of myſtery in which they had been ſo long enrapped. And if he has been *guilty* of unuſual freedom in ſo doing, in calling in queſtion the doctrines conſecrated by time or by *authority* (as it is too frequently termed; as if any thing could be an authority againſt truth!) but which, perhaps, had nothing but time or ſuch authority to conſecrate them,

he can only ſay that he is ſorry that ſuch freedom had not been exerted by others before him, rather than left unexerted 'till ſo late a day.

Truth is generally found in ſimplicity. Myſtery and authoritative aſſertion may, indeed, be of ſervice to error and to ignorance—to oppreſſion and to deceit; they may, at certain periods, ſupport a creed in religion, or an abſurdity in law; nay, they may even conſecrate an Inquiſition, or form the outworks of a Baſtile: but he would hope that the days of myſtery and authoritative aſſertion are paſt. He has conſidered aſſertion as aſſertion; and cared not by whom ſuch aſſertion was made; as he conceived that no man, however great he might be deemed, could plead exemption from what was juſt; or make right wrong, or wrong right. It was an obſervation of a noble perſon (though that noble perſon, perhaps, deſerves but little to be quoted,) that few things were ſo *uncommon* as *common ſenſe*: and certain it is that man frequently takes more pains to *reaſon* himſelf out of *rationality* than would have led him into the paths of truth.

The

The Author, therefore, has aimed at being explicit and conciſe: and if he ſhould be ſo fortunate as to ſucceed in his endeavours to communicate information, however ſmall the portion may be; if he ſhould ſimplify the doctrines he has treated of; or remove one error from the many which ſurround us, or induce another to do ſo; he ſhall think that his time and his labour have been profitably beſtowed.

The preſent volume contains the DOCTRINE OF MANORS, GRANTS, SURRENDERS, ENTAILS, REMAINDERS, EXECUTORY INTERESTS AND TRUSTS, ADMISSION, FINES, FORFEITURES, EXTINGUISHMENT AND SUSPENSION, AND ENFRANCHISEMENT; which includes the nature, creation, transfer, and deſtruction of Copyhold Intereſts. If his health and profeſſional engagements ſhall permit him, he intends to reſume the ſubject, and give a ſecond volume on COURTS, CUSTOMS, (comprehending the doctrine of FREE-BENCH, CURTESY, DESCENTS, *&c.*) SERVICES, as HERIOTS, *&c. &c.* And as ſuch ſecond volume will, in many parts, re-

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late more immediately to local matter than the preſent one, the communication of any curious entries, cuſtoms, &c. relative to particular manors, will be much eſteemed.

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ERRATA.

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ON

COPYHOLDS.

CHAP. I.

OF MANORS.

FROM ages remote and rude have we derived many of the moſt important maxims of our juriſprudence, and the radical, and, perhaps, the purer principles of our polity. Introductory remarks.

But we are not to eſtimate either the civil or political conſtitution of a nation by its antiquity, but its wiſdom. Many are the principles both of polity and juriſprudence, which, as they are founded in nature, muſt continue through all periods, invariably juſt; while others of arbitrary impoſition, flowing from a peculiar ſtate of manners, or ſuggeſted by emergency, will, when that emergency has ceaſed, or the manners of a people are meliorated and refined, demand the hand of wiſdom to remove them.

If it becomes man to concentrate every energy in preſerving the principles of rectitude and liberty, of national ſafety, and of individual peace, from being cruſhed by the ſtrong and unrelenting hand of power, or withered by the

blaſting breath of an all-contaminating corruption, it ſhould alſo be his care to prevent their being fruſtrated and ſupplanted by a narrow adherence to arbitrary rules. He ſhould cheriſh thoſe principles which ought never to die; and he ſhould ſuffer thoſe to die which were never intended to live.

If the radical principles of our legal or political ſyſtem partake of the barbarity, they partake alſo of the liberty, of earlier times. The arm of the ſavage which repelled an outward enemy, was lifted againſt an internal foe. He who had but few wants had, conſequently, but little dependency; and by being jealous of the power of others, he learned to preſerve his own.

The Feudal Syſtem.

We too generally aſſociate the ideas of tyranny and oppreſſion, of deſpotiſm and ſlavery with thoſe of the feudal ſyſtem. But the feudal ſyſtem originated in freedom; and that ſyſtem was corrupted when it ceaſed to be free (*a*).

Although admirably calculated for individual freedom and for national ſtrength, it was, like other antient ſyſtems, calculated more immediately for war. Inimical to commerce and the arts; incompatible with the progreſs of improvement in after ages; many of its principles became gradually obſolete and were loſt: but laws founded on thoſe principles were permitted to continue, when the principles on

(*a*) See *Watk. Introd. on the Feudal Syſtem*, prefixed to *Gilb. Ten. Watk. on Deſc. Ch.* 1. *ſ.* 1. *p.* 7. *n.* (*h*) and *Ch.* 3. *ſ.* 1.

which

which they were founded were forgotten or condemned.

Hence many of our uſages and laws appear arbitrary and needleſs, of uncertain import or of capricious impoſition, to thoſe, who, regarding them merely as exiſting rules, are unmindful of the times in which their principles were ſuggeſted, and of the policy which gave them birth But to the hiſtory and manners of the times muſt we recur, to illuſtrate thoſe laws which were ordained in ages that are paſt, and thoſe cuſtoms to which we have ſucceeded, as it were, by inheritance; to trace out their origin and mutation, the principles whereon they were founded, and their relation to the general ſyſtem of our legal polity.

The principles of our laws derived from it.

That our legal ſyſtem, as it is relative to property, is derived from that which is uſually denominated the feudal, and that the feudal ſyſtem owed its origin to the gothick tribes, ſeems ſufficiently evident (*b*).

Its origin and progreſs.

In rude ages the individual is generally found to be free. The nation is an aggregate of freemen, aſſociated for general protection and defence. Though each has a kind of individual independancy, each forms a part of a great whole: each is ameſnable to ſociety, and each is a compoſite portion of the ſtate.

Man is guided by facts before he reaſons abſtractedly. Authority over individuals and property in the ſoil they inhabited were not to be veſted in this or in that individual, but in the

(*b*) See *Watk. ubi ſupra.*

ſociety which the aggregate formed. Property and power, therefore, were lodged in ſociety; but ſociety was an abſtract idea. It was, conſequently, requiſite that ſociety ſhould be *repreſented*; and hence aroſe the chief political perſon of the ſtate (*c*). As ſociety was entered into for general defence and individual protection, ſome one was neceſſary to lead forth armies, to adminiſter juſtice, and to apportion lands.

The king was the repreſentative of ſociety.

But, in early times, a nation frequently conſiſted not only of an aggregate of individuals, but alſo of an aggregate of ſmaller ſtates: it was compoſed of an aſſemblage of families or tribes: it was a federal union of originally independant clans; each of which continued diſtinct, though their unity formed the ſtate.

Each horde or clan, notwithſtanding its union with others, was, as far as related to the perſons compoſing it, in itſelf a nation. It had its repreſentative who conducted the people to war, and who adminiſtered juſtice among them in peace. He frequently ſucceeded by inheritance (*d*); not indeed by right, but by cuſtom: for moſt of theſe clans were families derived from a common parent, in which the paternal authority was not perhaps wholly effaced. But, when ſeveral tribes, originally indepen-

And the lord of his clan.

(*c*) See *Watk. on Deſcents, c.* 1. *ſ.* 1. *p.* 7. *n.* (*l*). *c.* 3. *ſ.* 1. *p.* 92. *&c. Reflect. on Gov. ſ.* 5. *p.* 66. *&c.* and on the *Feudal Syſtem, pref. to Gilb. Ten. &c.*

(*d*) Vide *Tacit. de Moribus, Germ. c.* 7. See *Sulliv. ſect.* 3. *p.* 27, 8. *Watk. Reflect. on Gov.* 66.

dant

dant on each other, confederated and compoſed a general ſociety, the repreſentative of that ſociety, whether its powers were to be veſted in an individual, or delegated in portions to many, muſt neceſſarily have been choſen by the united clans.

When the northern nations abandoned their native plains, and over-ran, and, at length, ſettled on the ruins of the Roman power, theſe principles and uſages were obſerved. The great chief of the united ſtates was the generaliſſimo of the emigrating army; and each clan or family was marched under the banners, and afterwards ſettled under the protection of its reſpective chieftain or lord.

On a country or diſtrict being conquered, the confederated tribes compoſing the general army, or the confederated barons or individuals who compoſed an invading and adventuring party under the direction of their original or elected (e) chief, became entitled to their portion of the ſpoil.

The victorious army, or party of adventurers, however numerous or however few the component individuals, was a ſocial and connected body; and its repreſentative was its conducting chief. The conquered diſtrict was the property of the ſocial body; and, on its diviſion, each perſon entitled held his allotted portion of the

Diviſion of lands.

(e) *Boulainvilliers Etat. de la France, Tom.* 1. *Mem. Hiſtor.* 15. *Lacombe Abrigè Chronologique de l'Hiſtoire du Nord, Hiſt. de Dannemare. An.* 772. *Tom.* 1. *p.* 49. *Watk. on Deſc. c.* 3. *ſ.* 1. *p.* 94.

ſtate. The chief repreſented that ſtate; and the individual held his portion of his chief. The firſt diviſion was to be among the clans, or in the caſe of ſmall parties, among the individual adventurers, under certain ſervices; and theſe portions allotted were held immediately of the ſtate: the perſons to whom they were allotted were the tenants *in capite* of after days. The portion of country aſſigned to a clan, was, in the ſame manner, veſted in the leader or chieftain of ſuch clan: theſe chieftains were the barons of the ſtate. Each of theſe portioned out the allotment he received among his immediate followers; who alſo divided parts of their ſhares to others who were dependant immediately on them. Theſe inferior chiefs were thoſe who afterwards were denominated the *meſne* lords.

Tenants *in capite.*

Meſne lords.

What remained unallotted by the king, or the reſpective chieftains or lords, was ſaid to be in his *demeſne*, or in his immediate poſſeſſion and uſe. Theſe demeſnes, if not ſuffered to lie waſte, were cultivated by his own ſervants, or granted out in ſmall allotments to perſons who, not being freemen, had no title to a ſhare on the former diviſion; and theſe allotments were reſumable at his pleaſure; for ſo dependant and ſervile was their ſtate, being moſtly the captivated natives of the countries which were overrun (*f*), they were not only incapable of a durable property, but were themſelves conſidered

Demeſnes.

(*f*) And ſee *Britt. cap.* 31. *de Naiſte.*

as

as the property of their lord. In after times indeed, many who were free in their perſons accepted theſe gifts, under ſervices denominated *villein* or baſe ſervices: but theſe were frequently ſuch as were expelled from their free poſſeſſions, by the ſtrong hand of turbulency and oppreſſion, and driven by neceſſity to accept what, in better days, would have been conſidered as derogatory to a freeman (*g*).

Thus part of the portion allotted to the king or lord, was held by his followers in frank-tenure, under certain ſervices and returns, and part remained in his hands, either waſte or cultivated by his villeins or meaner dependants. The whole territory of the lord was denominated his manor or barony; his honour or lordſhip; according to the language of the day. Manors.

Many and diſcordant have been the conjectures on the etymology of the term *manor* (*h*). But that which appears the moſt juſt, is, that the term is derived from the French *meſner*, which ſignifies to govern or to guide; becauſe the lord of a manor has the guidance and direction of all his tenants within the limits of his territory: "and this," ſays Sir *Edward Coke*, "I hold the moſt probable etymology, and moſt agreeing with the nature of a manor; for a manor in theſe days ſignifies the juriſdiction and royalty Etymology of the term.

(*g*) *Bract. Tr.* 1 *Lib.* 4. *c.* 28. *f.* 5. *Fleta, Lib.* 1. *c.* 8. *f.* 2. *Britt. c.* 66.

(*h*) See *Spelm. Gloſſ. voce Manerium. Cowell. v.* Manor. *Co. Copyh. f.* 31. *Tr. p.* 51-2. *Boulainvil. Etat. de la France. Tom.* 1. *p.* 41. *Whit. Manch. B.* 1. *c.* 8. *f.* 3.

incorporate, rather than the land or ſcite." (*i*).

Judicial power of the lords.

This etymology moſt certainly accords with the nature of the thing. The chief or prince, in moſt ages and nations, poſſeſſed the civil with the military power. The baron led his tenants to war, and he adminiſtered juſtice among them in peace. His juriſdiction was commenſurate with his territory. His tenants aſſembled in his hall, where juſtice and equity were diſpenſed. This court, called the hall-mote (*k*) from the place in which it was held, or the court baron from the territory to which it belonged, was abſolutely incident to the manor. It was of its very eſſence: it appertained to it of neceſſity. It was inſeparable from the barony; which could not even exiſt without it. And the *ſuit of court*, or the obligation of attendance, was alſo inſeparably incident to the feud.

Court baron.

(*i*) *Co. Copyh. f.* 41. *p.* 52. Thus the term *Manorhood* occurs in old cuſtumals, eſpecially in thoſe of the north, and is uſed in this ſenſe: "And he further ſaith that the privileges of the game of fiſhing, fowling, hawking, and hunting within the ſaid foreſt and park (of *Stanhope*) *with the Manorhood of the inhabitants within the pariſh of Stanhope*, belong to the biſhop of *Durham's* foreſter for the time being." *Depoſition relative to the cuſtoms of* Weardale *in* Durham, *A. D.* 1595.

(*k*) See *Spelm. Gloſſ. voce* Halmote, and 4 *Inſt.* 268.

In

In this court the ſuitors were judges (*l*): the freeman could only be tried by his peers (*m*): his equals, his fellow frank-tenants. Hence if the lord had no tenants, by reaſon of eſcheat or the like, he had none over whom to excerciſe juriſdiction. If he had but one tenant, that one, having no peer, had no judge; and conſequently he appealed to the court of the lord immediately above. Hence we find in our books that if there are not two frank ſuitors at the leaſt, (*n*) the court baron cannot be held, and conſequently, that the manor is deſtroyed. But it ſhould ſeem that there muſt be *more* than two frank tenants holding of the manor, to enable the lord to hold a court; for otherwiſe, if one of thoſe two was the plaintiff, and the other of thoſe two the defendant, the lord would be under ſome difficulty to try them by *their peers* (*o*). Upon the continent indeed, at a certain period, the lord who had not a ſuffi- Trial by peers.

(*l*) *Co. Lit.* 58. *b.* 4 *Inſt.* 268.

(*m*) *Magna carta, c.* 29. Vide *Lindenbrogius. Cod. Leg. Antiq.* 679. *Ll. Longob. Tit.* 8. and *Spelm. Gloſſ. voce Pares Curiæ, & Parium Judicium.*

(*n*) *Bro. Court. Bar. pl.* 22. *Compriſe. pl.* 31. *Kitch.* 4. *a,* 3 *Durnf. and Eaſt* 445. *Glover* v. *Lane.* 2 *Ld. Raym.* 863-4. *Tonkin* & *Croker.*

(*o*) The truth ſeems to be that there ſhould be ſo many frank tenants, as, in caſe of an action, to leave a plurality of ſuitors to ſit as judges in the cauſe. There is an inſtance in the Regiſter, *f.* 11. *b.* of a cauſe being removed out of a court baron, by reaſon of there not being *four* ſuitors there. See the Regiſter, *ubi ſup.* and *Bro. Cauſe. a remover plee, &c. pl.* 35. and ſee alſo *Britt. Cap.* 120. *de Court de Baron,* fol. 274. *b.* 275. *a.*

cient

cient number of peers for the purpoſe, might have borrowed or hired a few of the lord paramount (*p*); but as he could not compel the peers he had borrowed to give judgment, it ſeems that the circumſtance ſtood him but in little ſtead. Hence, perhaps, the practice ſo ſoon declined.

If the party was diſſatisfied with the judgment of his peers, he might have appealed them: that is, he might have fought them: he might have dared them to the combat, and appealed to the deciſion of heaven. If he did not appeal till judgment was pronounced, he was obliged to fight the whole bench (*p*). And it is obſervable that their ſenſe of honour, and of their own importance and independency was ſuch that the lord could not (and cannot even now, in this nation, unleſs warranted by cuſtom,) (*q*) compel the free-ſuitors, as between party and party, to be ſworn: this would have been to call their honour in queſtion. Hence perhaps the ſuitors in a court baron are called the *homage* or *homagers*, or *benchers*, and not the *jury*, to this day.

Cuſtomary court.

Again, the lord had a court for his villeins (*r*), who held at his will by copy: for the ſuitors in

(*p*) *Monteſq. Eſp. des Loix. Liv.* 28. *c.* 27. *&c.*
(*q*) 2 *Inſt* 142. *Bro. Court Bar.* 2 and 23.
(*r*) The *Court Baron* is frequently called by *Britton* and other ancient writers, "*la court des francks homes*," or the court of the *free-men*; (See *Britt. cap.* 120. *fol.* 275. *a*,) as contradiſtinguiſhed from the cuſtomary court, or the court of villeins.

the

the court baron, could not notice the claims of the villeins who were of a different order of men. In the court of the copyholders, or cuſtomary court, as it was frequently called, were all matters relative to the tenements held by copy tranſacted. But the copyholders not being originally free in their perſons nor holding by frank tenure, were not entitled to be tried by their peers. The lord himſelf, or his ſteward who ſat for him, was the judge of their court (*s*): they were his villeins, and dependent on his will. As they were beholden to his favour for their lands, ſo he might have reſumed thoſe lands at his pleaſure. To this court, however, the copyholders owed ſuit as the free tenants did to the court baron; and, like the latter, were denominated the homage: not indeed that the copyholder ever did homage expreſsly, as the frank tenant did, on acceeding to the tenancy; for homage could only be done by a freeman. For to what purpoſe could it be to make the copyholder ſay "I become your man from this time forth," when he was the lords man already by reaſon of his villeinage? And in after days, when thoſe who were free in their perſons accepted lands to be held by copy, they were ſtill only tenants *at will*. It ſhould ſeem therefore, that they were ſo called in the cuſtomary court by way of analogy to the homage in a court baron, and that the term was derived from the latter court.

(*s*) *Co. Lit.* 58. *b.* See *Watk.* No. LXXXVIII, LXXXIX, CXI, to *Gilb. Ten. p.* 432. *&c.* 447. *&c.*

Having

mind, the manor to which that court belonged muſt neceſſarily have exiſted time out of mind alſo; and if ſo, what becomes of the doctrine that manors might have been created by a tenant of a common lord till the ſtatute of *quia emptores*, or by a tenant *in capite* of the king till the 34th of *Edward* the Third?

For the truth ſeems to be, from the very nature of the thing as well as from hiſtorical facts, that the court was dependant upon the manor, and not the manor upon the court. The manor was the principal; the court was only an incident. On the creation of a manor the court baron followed of neceſſity.

With reſpect to the tenant *in capite*, was the ſtat. 34 *Ed.* 3. a repeal, *ex neceſſitate*, of the ſixth chapter of the ſtatute *de prerogativa regis?* Upon the ſuppoſition that it was, it does not follow that the tenant *in capite* might not have aliened *with licence*. Even the ſtat. *quia emptores* might, it is ſaid, (*b*) have been diſpenſed with by the lord: And the king was within that ſtatute when the lands aliened under it were held of him *in capite ut de honore*, (*c*) though he was not bound when they were held *in capite ut de corona*, (*d*). It does not, therefore, ſeem to follow of neceſſity that the creation of manors muſt have ceaſed in the reign of *Edward* the Firſt. For though it is true that it is eſſential to a manor that there be tenants who hold

(*b*) See *Bro. Ten. pl.* 2. *F. N. B.* 211. *I.*
(*c*) *Wright's Ten.* 162.
(*d*) See *Gilb. Ten.* 52. and *Watk. n.* (*i*).

of

of the lord, yet the poſition that, by the operation of the ſtatutes we have cited, no tenant *in capite* ſince the acceſſion of *Edward* the Firſt, and no tenant of a common lord ſince the ſtatute of *quia emptores* can create any new tenants to hold of himſelf (*e*), appears diametrically contrary to fact: unleſs, indeed, we ſuppoſe that it be abſolutely eſſential to the very exiſtence of a manor that the tenants ſhould be tenants in fee: the neceſſity of which the whole hiſtory of feuds and the preſent ſyſtem of copyholds ſeem moſt completely to negative. But granting even that the tenants muſt neceſſarily have held in fee, it does not appear that the tenant *in capite* might not have aliened in fee *with* licence after the paſſing of the latter act.

However, as our immediate conſideration of the creation and progreſs of manors is relative more particularly to the doctrine of copyholds, it may ſuffice, without attempting to reconcile each poſition with principle, to remark that it ſhould ſeem to be laid down as law in a way not now to be diſputed that no ſuch manor can, at this day, be created *of which a copyhold can be held.* A copyhold muſt be held "according to the cuſtom of the manor," and a cuſtom, it is ſaid, muſt be from time whereof the memory of man is not to the contrary. Though a perſon, therefore, may, at this day, create a tenancy, yet he cannot at this day create a cuſtom: and if he cannot at this day create a cuſtom, he can-

(*e*) See 2 *Bl. Comm.* 92. *ch.* 6.

not

not at this day create a manor of which copyholds may be held. A copyhold cannot be granted "according to a cuſtom" which does not exiſt.

And wherefore, it may be aſked, then urge theſe objections to the propriety and juſtice of a doctrine which it would be needleſs to combat. To remind the ſtudent that it is his duty to think and to reaſon for himſelf. That if he implicitly acquieſces in what is abſurd or unintelligible, he adopts it, and makes it his own; but that, if after inveſtigation he is obliged to ſubmit, he ſhould regard it as the abſurdity of others which he is not to anſwer for, but to mark.

Diviſion of manors.

The law relative to the *diviſion* of a manor ſeems to be involved in ſtill more uncertainty and doubt.

Before the ſtatute of *quia emptores terrarum*, as a manor might have been created, ſo it might have been divided; and the number of manors of conſequence, encreaſed (*f*). But if, according to the doctrine before noticed, a manor could not have been created ſince the paſſing of that act, by a tenant of a common lord, it ſhould ſeem to follow that ſince the paſſing of that act, a manor cannot be divided into ſeparate manors, by the tenant of a common lord, as ſuch diviſion would be a multiplication in effect. However, a diſtinction has very properly been made between a diviſion by act of law, and a diviſion by act of the party.

(*f*) Vide *M.* 8, *Ed.* 2. *f.* 250. *Mayn. Kitch.* 4. *a.*

It

It appears to have been acknowledged by the ancient books (*g*) and often recognized by later authors (*h*,) that a manor might have been divided, ſubſequently to the ſtat. *quia emptores*, by *act of law:* As if a manor deſcended to ſeveral coparceners, and ſuch coparceners made partition, each ſhould have had a manor, in caſe part of the demeſnes and ſervices were allotted to one and part to the other (*i*). But though the *manor* might have been divided, the *tenancy* could not have been ſo: as if a tenant held by rent and certain other ſervices, and the coparceners, on partition, apportioned the rent and ſervices, neither could have avowed without the other (*k*).

With reſpect, indeed, to joint-tenants, it is ſaid that the manor ſhall not be divided as in caſes of parceners; as joint-tenants come in by purchaſe (*l*); though *Anderſon* thought there was no difference between them (*m*).

But whether a manor can be divided by *the act of the party* does not appear to be by any means ſettled. Moſt of the ancient caſes are relative to acts of law; and moſt of the modern ones are deductions from them. In Sir *Moyle*

(*g*) *M.* 17 *Ed.* 3. *pl.* 102. *f.* 72. *b.* *Paſchæ.* 9 *Ed.* 4. *pl.* 18. *f.* 5. *a.* *Trin.* 12. *Hen.* 4. *pl.* 13. *f.* 25. *b.* *Mich.* 11 *Hen.* 6. *pl.* 10. *f.* 26. *a.* *Trin.* 26 *Hen.* 8. *pl.* 15. *f.* 4. *a.*

(*h*) 4 *Co.* 26. *b.* 6 *Co.* 64. *a.* &c.

(*i*) Vide *Trin.* 26 *Hen.* 8. *pl.* 15. *f.* 4. *a.* &c. as in (*g*).

(*k*) *Mich.* 17 *Ed.* 3. *pl.* 102. *f.* 72. *b.*

(*l*) *Cro. Eliz.* 39. *per Periam J.* in *Morris* v. *Smith* & *Paget*, and 1 *Leon.* 27. *S. C.*

(*m*) 1 *Leon.* 28.

Finche's caſe (*n*), a diſtinction was taken between acts of law and of the party: and Sir *Edward Coke* affirms, in a note to *Melwich*'s caſe (*o*), that a lord cannot by his own act make of one and the ſame manor, at the common law, ſundry manors conſiſting of demeſnes and freeholders. There is, however, a great contrariety of opinion on this point, as may be ſeen in the books cited in the margin (*p*). To reconcile theſe, would be a taſk of no ſmall difficulty. But I muſt confeſs that none of the ancient caſes that I am aware of, many of which are ſo generally referred to, by any means amount, in my conception, to warrant the doctrine that a manor *may* be divided by *the act of the party*: and the inconveniency, if not the nature of the thing militates, I think, ſtrongly againſt the adoption of ſuch a doctrine.

Separation of the cuſtomary part of a manor from the free.

If the lord grant the freehold of *all* the copyholds within his manor to a ſtranger in fee, it is ſaid (*q*) that the grantee may keep a cuſtomary court, and regrant the copyholds in caſe of eſcheat, *&c.* For this, ſay they, is only the diviſion of the courts: and the legal manor remains in the original lord.

(*n*) 6 *Co* 63. *a.*

(*o*) 4 *Co.* 26 *b.* and ſee *Gilb. Ten.* 210-12. and 6 *Co.* 63. *a.*

(*p*) *Gilb. Ten.* 210-12. *Cro. Eliz.* 19. *Harris & Haies* v. *Nicholls, Ibid.* 38. *Morris* v. *Smith & Paget.* 1 *Leon.* 36. *Marſh & Smith, Cro. Eliz.* 300. 4 *Co.* 26. *b.* 6 *Co.* 63. *a.* *&c.* and ſee 15 *Viner* 223. *Manor* (G).

(*q*) 4 *Co.* 26. *Melwich's* caſe.

But

But a doctrine like this is juſtly queſtio
and perhaps, on inveſtigation it will appea
only incompatible with principle, but e
deſtitute of authority itſelf.

It was acknowledged in the caſes of *Murre*
and *Smith* (*r*), and *Melwich* and *Luter* (*s*) that,
by the grant, the copyholds were ſevered from
the manor. To have permitted the act of the
lord to deſtroy the intereſt of his copyholders,
would certainly have been unjuſt: and it would
have been inconſiſtent with the very grant that
the copyhold intereſt ſhould be turned into
freehold, as the freehold was the ſubject of the
grant. But, ſurely, it muſt be evidently repug-
nant to undeniable principles to ſay that the
grantee of the inheritance ſhould, in caſe of
eſcheat or the like, be warranted in granting
the premiſes by copy again. A copyhold muſt,
in its very nature, be *within*, and *parcel of* a
manor, and held at the will of the lord, ac-
cording to the cuſtom of the manor of which it
is ſo held. On a re-grant, in the preſent caſe,
therefore, *within* what manor ſhall the premiſes
be deemed? What manor are they to be par-
cel of? According to what cuſtom are they to be
held? By the conveyance of the freehold they
were ſevered from the original manor: they were
no longer within, or parcel of *that* manor: nor
can they be held according to the cuſtom of that
manor of which they have ceaſed to be held at
all. The grantee of the inheritance of the free-

(*r*) 4 *Co.* 24 *b.* *Cro. Eliz.* 252.
(*s*) 4 *Co.* 26 *a.* *Cro. Eliz.* 102.

hold muſt hold of the lord above: but the copyholders muſt hold of the grantee. The copyholds, therefore, on a re-grant, could not be held according to the cuſtom of the manor paramount; and it ſhould, conſequently, ſeem that they could not be regranted by copy at all.

And if we look into authorities the doctrine appears equally deſtitute of ſupport. If the lord grant the inheritance of *one* copyhold only, it is acknowledged that the grantee cannot hold a court; nor grant the land as copyhold again (*t*). And in the caſe of *Neale* and *Jackſon* (*u*) the grant was only of a chattel intereſt; and, conſequently, not within the ſtatute of *quia emptores terrarum*. And, in the inſtance of the grant of the freehold and inheritance of *all* the copyholds in the manor, the only caſe I can find (*w*) which countenances the doctrine ſeems to have been denied by the juſtices on a writ of error being brought in the exchequer chamber:—for although the matter was compounded, the deciſion in *B. R.* was given up as inſupportable; and the judgment declared to be "a ſtrange judgment," never entered up by the direction of the court; and all the juſtices and barons in the exchequer chamber held clearly that the grant by copy, by the grantee of the freehold, was void (*x*).

(*t*) 4 *Co.* 24. *b. Murrell & Smith.* 4 *Co.* 27. *a.*
(*u*) 4 *Co.* 26. *b. Cro. Eliz.* 395.
(*w*) *Melwich & Luter*, 4 *Co.* 26. *a.*
(*x*) *Cro. Eliz.* 103-4. and 443.

A manor

A manor may be ſuſpended for a time and revive again: as where the lord leaſes all the demeſnes of the manor for years; the manor, during the exiſtence of the leaſe, is ſuſpended: but, on the expiration of the term, it ſhall revive (*y*). So, if a manor deſcend to two parceners, and, on partition, the ſervices be allotted to one and the demeſnes (*z*) to the other, and the one die, the manor ſhall revive; for it was ſuſpended only, and not deſtroyed (*a*). Suſpenſion of a manor.

Our next enquiry is into the means of deſtruction: and in the firſt place, as a manor muſt conſiſt of demeſnes and ſervices, we may obſerve that whenever they become abſolutely ſeparated, ſo as to be incapable of uniting again, the manor no longer continues a manor in reality (*b*), though it may in reputation; or in other terms, it would ceaſe to be a legal manor, though it may ſtill be a ſeigniory in groſs (*c*). Deſtruction of a manor.

If the lord grant all the demeſnes (*d*,) or all the ſervices (*e*) to a ſtranger; or if all the ſer-

(*y*) 1 *Leon.* 27-8. cited as ſo adjudged.

(*z*) *Trin.* 12 *Hen.* 4. *pl.* 13. *f.* 25. *b.* *Mich.* 18 *Hen.* 6. *pl.* 10. *f.* 26. *a.*

(*a*) See 12 *Hen.* 4. and 18 *Hen* 6. as before, and 6 *Co.* 64. *a.* 2 *Rol. Abr.* 122. *Manor* (F) *pl.* 3. and (H) where the ſame caſes are cited.

(*b*) See 2 *Roll. Abr.* 122 *Manor* (H). *Littl. Rep.* 128. and the caſes before cited from the Year-books; to which add *Trin.* 9 *Ed.* 4. *pl.* 17. *f.* 17. *b.* and 1 *And.* 257.

(*c*) See *F. N. B.* 3. C.

(*d*) 6 *Co.* 63. *a.* Sir *Moyle Finch's* caſe.

(*e*) *Trin.* 9 *Ed.* 4. *pl.* 17. *f.* 17. *b.* and *vide Mich.* 17 *Ed.* 3. *pl.* 102. *f.* 72, *b.* and *Trin.* 12 *Hen.* 4. *pl.* 13. *f.* 25. *b.* and *Skin.* 661. in the caſe of *The King* v. Biſhop of *Cheſter*.

vices become extinct; (*f*) the manor will be deſtroyed.

We have already ſeen that a court baron is eſſential to a manor at law; and that there muſt be frank tenants who owe ſuit: If all the frank tenancies, therefore, eſcheat, or become forfeited, or purchaſed by the lord, the manor is properly at an end (*g*), though it may continue, in contemplation of law, as to certain purpoſes; as to preſerve the right of wrecks and eſtrays, &c. (*h*). So, if there be but one free tenant, the ſeigniory as to him remains with reſpect to his ſervices, &c. though there can be no court held (*i*).

(*f*) *Yelv.* 190. *The King* v. *Staverton.*
(*g*) *Bro. Compriſe. pl.* 31. and *ante.*
(*h*) *Calth.* 13. and *vide Trin.* 9. *Ed.* 4. *pl.* 17. *f.* 17. *a.* *Danby.*
(*i*) 1 *Anders.* 257. 2 *Lord Raym.* 864.

CHAP. II.

Of GRANTS.

IN the preceding chapter we have ſeen that the lord allotted certain portions of his demeſnes to be cultivated by the lower order of his dependents, who held them at his will, under ſervices of a baſe and ruſtic nature, and ſuch, as in the conception of thoſe days, became the villein to return. Thoſe allotments, like the ancient feuds, were properly the lords gifts in recompence of acknowledged fidelity and in conſideration of future ſervices. Nature of a grant.

We may therefore define a grant to be, "a gift of the lord to another perſon of a certain portion of his demeſnes, to be held by copy of court of Roll, at the will of the lord, according to the cuſtom of the manor, under the uſual ſervices and returns." Defined.

And, firſt, it is "a *gift*," and this the very term implies. Even feuds held by frank tenure were originally *gifts*: hence were they denominated *munera*, *beneficia*, and *feuda*; and the terms ſtill uſed in feoffments are thoſe of "give and grant;" *do* and *dedi* being regarded as the moſt apt and proper in that ſpecies of conveyance (*k*).

And when we conſider that copyholders were originally of ſo ſervile and baſe a claſs of men,

(*k*) See *Co Lit.* 9. *a.* and *Watk.* No. II. to *Gilb. Ten.* 1. *a.*

and that they held their tenements ſtrictly at will, we muſt neceſſarily regard thoſe tenements as primarily derived from the munificence of the lord, as they continued to be even afterwards held at his pleaſure.

Hence, too even at this day, a copyholder may, in pleading, allege any admittance, either upon a deſcent or ſurrender, as an immediate *grant* from the lord (*l*).

Who may grant.

Secondly, a copyhold "is the gift *of the lord*." And here we may enquire into the capacity of the lord to grant.

In voluntary grants, ſays Sir *Edward Coke*, which are made by the lord himſelf, the law neither reſpects the quality of his perſon, nor the quantity of his eſtate: for be he an infant, and ſo through the tenderneſs of his age inſufficient to diſpoſe of any land at the common law; or *non compos mentis*, an idiot, or a lunatic (*m*), and ſo for want of common reaſon unable to traffick in the world; or an outlaw in any perſonal action, and ſo excluded from the protection of the law, or an excommunicate, *&c.* yet he is capable enough to make a voluntary grant by copy.

Infant, &c.

And the quantity of the lord's eſtate is no more reſpected than the quality of his perſon: for if

(*l*) *Cro. Jac.* 103. *Pyſter* v. *Hemling.* 4 *Co.* 22. *b.* *Brown*'s caſe.

(*m*) His *committee* cannot grant. Though in *Blewit's* caſe, the court ordered that the ſteward ſhould apprize the committee and the court alſo, of his intention to grant by copy; but this was a matter of diſcretion, and not of right. *Ley.* 47-8. and 6 *Vin.* 17. *Copyh.* (G) *pl.* 15.

his

his intereſt be lawful, be his eſtate never ſo great or never ſo little, it is not material: for be it in fee, or be it in tail, or dower, or as tenant by curteſie, for life or for years, as guardian, or as tenant by ſtatute, or as tenant by *elegit*, or at will, the leaſt of theſe eſtates is a ſufficient warrant to the lord to grant any copyhold eſcheated unto him, for as long time as the cuſtom doth allow, the ancient rents and ſervices being truly reſerved; and theſe grants ſhall ever bind them that have the inheritance, or frank tenement of the manor (*n*). And the reaſon of the law is this: A copyholder upon voluntary grants made by copy doth not derive his eſtate out of the lord's eſtate only, for then the copyholders eſtate ſhould ceaſe when the lord's intereſt determines; *nam ceſſante primitivo, ceſſat derivativus*: but the life of the copyholder's eſtate is the cuſtom of the manor; and therefore whatſoever befalls the lord's intereſt in his manor, be it determined by the courſe of time, by death, by forfeiture, or other means, yet if the lord were *legitimus dominus pro tempore*, how ſmall ſoever his eſtate was, that is enough; for the ſame cuſtom that fixes a copyholder inſtantly in his land upon his admittance, will likewiſe preſerve and protect his intereſt to the end in ſuch manner that though the lord's intereſt fails, yet his ſhall never fall to the ground, being upheld by

A perſon having a particular intereſt only.

(*n*) But it has been ſaid that a lord having a particular eſtate, cannot grant a copyhold by parcels, or demiſe part and retain the reſidue himſelf. *Per Popham, Cro. Eliz.* 662. in *Gay* v. *Kay*. *Sed Quære.*

ſuch

ſuch a prop, ſuch a pillar; unleſs perchance the copyholder offer violence to his founder, in breaking the cuſtom (*o*).

A perſon ſeized in right of his church.

So a biſhop, prebendary, parſon, &c. ſeized in right of churches, may grant by copy in fee; if an eſtate in fee be warranted by the cuſtom of the manor; and it ſhall bind their ſucceſſors; and in the caſe of the biſhop, ſuch grant will be good even againſt the king on the vacancy of the ſee (*p*).

of his wife.

So if a perſon be ſeized of a manor in right of his wife, he may together with his wife grant copyholds in fee, and it ſhall bind the wife and her heirs: but it is ſaid in the caſe of *Shopland* and *Ryoler* (*q*), that the huſband cannot grant them in his own name; but the wife muſt join in the grant.

Joint-tenants.

But if there be two joint tenants of a manor, one only may grant, and it will be good againſt his companion; for he was *dominus pro tempore*, and each was ſeized *per mie & per tout* (*r*).

Conditional or defeaſible intereſt.

If, therefore, a perſon have a lawful intereſt in the manor at the time of the grant made it is enough. The intereſt need not, we find, be anyways commenſurate with the eſtate ſo granted by copy. Should the intereſt in the manor be

(*o*) *Co. Copyh. ſ.* 34. *Tr.* 67. &c. 4 *Co.* 23. *b. Clarke* v. *Pennyfather.*

(*p*) 4 *Co.* 21. *b.* in *Brown's* caſe, and the books cited, to which add *Trin.* 15 *Hen.* 7. *pl.* 13. *fol.* 10. *a.* 4 *Co.* 23. *b. Gilb. Ten.* 197.

(*q*) *Cro. Jac.* 99.

(*r*) See *Co. Copyh. ſ.* 34. *Tr. p.* 76. *Gilb. Ten.* 330. But ſee a *Dictum* of *Anderſon contra* in 1. *Leon.* 234.

determined

determined the moment after the grant be made, nay, if it be wholly and *ab initio* defeated, it matters not, provided the intereſt of the granting lord was a lawful intereſt at the time of the grant.

Thus, if a manor be granted upon condition, and, before the condition be broken, the land be granted by copy, and then the manor become forfeited, and the feoffor enter; yet the copyhold eſtate will remain untouched, becauſe lawfully eſtabliſhed by cuſtom. If a man ſeized of a manor in fee die ſeized, having iſſue a daughter, and, his wife being *privement enſient* with a ſon, the daughter grant lands by copy; this grant ſhall ſtand good againſt the ſon, for the daughter was *legitima domina pro tempore.* So, if the feoffee of a manor upon condition to infeoff a ſtranger the next day, make a voluntary grant by copy, this ſhall bind: and yet his intereſt was to have but ſmall continuance. If a manor be granted with a feme in frank marriage, and there be a divorce had *cauſa præcontractus*, ſo that now the intereſt of the manor is granted to the feme only, and by relation the marriage is void *ab initio*; yet becauſe the baron was *legitimus dominus pro tempore*, any copyholder's eſtates granted before the divorce will remain good. So, if a man eſpouſe a feme ſeignioreſs under the age of conſent, and after ſhe diſagree; though the marriage by relation was void *ab initio*, yet copyholds granted before diſagreement ſhall never be avoided; *cauſa qua ſupra.*

If the lord of a manor commit felony or murder, and proceſs of out-lawry be awarded againſt

Lord committing felony.

againſt him, and after the exigent he grant copyhold eſtates, according to the cuſtom, and then be attainted; theſe grants are valid, though by relation the manor was forfeited from the time of the exigent awarded. So, if the lord had been attainted by verdict or confeſſion, any grant by copy after the felony or murder committed, ſhall ſtand good, notwithſtanding the relation. If the lord of a manor acknowledge a ſtatute, and then grant lands by copy, and after the manor be delivered to the cogniſee in extent; the grant cannot by this be impeached (*s*).

Dowreſs. If the lord, after marriage, grant by copy and die, and his widow be endowed, yet the grants will be good againſt her: but if the heir, after the death of the huſband and before endowment grant, it ſhould ſeem that the widow may, on being endowed, avoid ſuch grants of the heir (*t*).

A perſon having an unlawful intereſt. But no grant can be good if made by a perſon having only a tortious or unlawful intereſt, as a diſſeiſor, abater, or intruder, or even by the heir or feoffee of ſuch diſſeiſor, &c. or the diſcontinuee of a tenant in tail; or by a tenant by ſufferance, as if a perſon ſeized *pur auter vie* of a manor grant by copy, after the death of *ceſtuy que vie:* In all theſe caſes the grants

(*s*) *Co. Copyh. f.* 35. and poſt. 45.
(*t*) *Co. Copyh. f.* 35. *Tr. p.* 71. *N.* (6) to *Co. Litt.* 58. *b.* cites *Rous* and *Artois.*

would

would not be available againſt the perſons having right (*u*).

It is not, however, neceſſary, where the intereſt is lawful, that the lord ſhould grant in his own perſon. A ſteward, retained by patent in the caſe of the king (*w*), or even by word only in the caſe of the ſubject (*x*), may grant according to the cuſtom of the manor, without the expreſs direction or aſſent of his lord (*y*): though not in oppoſition to his poſitive commands (*z*). Grants by the ſteward.

But in order to enable the ſteward to *grant*, it is not enough that he be ſteward *de facto*, he muſt have a lawful authority. In matters of neceſſity, indeed, or in which the perſon is merely an inſtrument, as in admittances on ſurrenders, the acts of a ſteward *de facto*, of only a reputed or oſtenſible authority, will be good; as the perſon taking under ſuch act is not obligated to examine into his authority, and the perſon acting does that only which the lord himſelf would be compellable to do (*a*).

So, an under, or deputy, ſteward may grant (*b*); and even ſuch deputy may ſubſtitute or ap- Under ſteward, &c.

(*u*) *Co. Copyh. f.* 35. *Co. Litt.* 58. *b.* 1 *Roll Abr.* 499. *Copyhold* (C) *pl.* 2. *Rous* and *Artois.* 2 *Leon.* 45. S. C. *Gilb. Ten.* 198. *&c.*

(*w*) 4 *Co.* 30. *a. Harris* and *Jay. Gilb. Ten.* 221.

(*x*) *Co. Copyh. f.* 45. *Tr. p.* 104.

(*y*) *Harris* and *Jay, ubi ſup. Gilb. Ten.* 221.

(*z*) *Cro. Eliz.* 699. *Harris* and *Jay.*

(*a*) *Gilb. Ten.* 315. *Cro. Eliz.* 699.

(*b*) See *Moore* 112. *Bro. Ten. p. Copie. pl.* 26.

point

point another to do ſo (*c*). But in caſe of the king, it is ſaid that the ſteward muſt be expreſsly empowered by his patent to appoint a deputy, or the grant by ſuch deputy will not be good (*d*).

Bailiff. The bailiff of a manor cannot, as ſuch, make a grant by copy; for ſuch a power does not appertain to his office, which was inſtituted for other purpoſes (*e*).

Grant out of court. And we may here remark that the lord or ſteward may grant as well out of court as in; and it ſhould ſeem as a neceſſary conſequence, out of the manor alſo: but it is ſaid that an under ſteward cannot grant out of court without a ſpecial authority or cuſtom enabling him ſo to do. Yet *quære* as to this latter point (*f*).

To whom a grant may be made. *Thirdly*, It is the gift of the lord "*to another perſon.*" For the lord cannot grant to himſelf; nor can he hold of himſelf by copy: *nemo poteſt eſſe tenens et dominus*, was the eſtabliſhed axiom of the diſtant day.

The lord himſelf cannot be a grantee. *Lord Coke*, indeed, tells us, that the lord himſelf may take a copyhold to his own uſe (*g*): but it is evident that he was then ſpeaking of the lord's taking a *ſurrender* to his own uſe; for although the profeſſed object of his chapter in which the cited paſſage is to be found, is to point out who may be *grantees*, yet in truth the

(*c*) See 1 *Leon.* 288. Lord *Dacre's* caſe; and ſee alſo 1 *Lord Raym.* 658.
(*d*) 4 *Co.* 30. *a. b. Harris* and *Jay.*
(*e*) *Gilb. Ten.* 204.
(*f*) See *Watk.* No. CXI. to *Gilb. Ten.* 447.
(*g*) *Co. Copyh. ſ.* 35. *Tr. p.* 79.

greater

greater part of that chapter is confined to the capacity of the *ſurrenderee*.

So, the lord cannot grant to his own wife; for ſhe is not another perſon in the eye of the law: the huſband and wife being but one perſon in legal eſtimation (*h*). Nor his wife.

Again; it ſhould ſeem that the grant ought to be confined to a *perſon*: for it does not appear that a *corporation* can hold by copy. So the king cannot be a copyholder; not only in his corporate, but in his natural capacity: for it is below his majeſty, ſays the law, to perform ſervile ſervices (*i*): but, indeed, according to a doctrine long eſtabliſhed, he cannot perform any ſervices at all; ſince he can hold of none (*k*). Nor a corporation.

In *Calthorpe* (*l*) it is ſaid that an alien may be a copyholder; but this, I conceive, is under the idea that a copyholder is ſtrictly a tenant at *will*, which an alien may be: but as a copyholder has ceaſed to be merely ſuch, it is clear that an alien cannot hold by copy (*m*). Nor an alien.

But, with reſpect to other perſons, we may obſerve, generally, that thoſe who are under no diſability to take by grant at common law, are

(*h*) 2 *Wils.* 254. *Firebraſs* d. *Symes* v. *Pennant*.

(*i*) 2 *Siderf.* 82. in *Field* v. *Boothſby*.

(*k*) *Co. Litt.* 1. *b. Dyer.* 2. *b. pl.* 8. in marg. and 154. *b. pl.* 18. Yet there are many inſtances of kings holding lands of a ſubject in ancient Days. See 1 *Rob. Scotl.* 8. and *N. Stu. Diſſ. Antiq. Engl. Conſtit. p.* 3. *ſ.* 3. *p.* 160. *N.* (6).

(*l*) *p.* 52.

(*m*) See *Dyer* 303. *a.* in margin.

capable

capable of taking by copy according to the cuſtom of the manor (*n*).

What may be granted.

Fourthly, It is "a gift of the lord, *&c.* of a certain portion *of his demeſnes.*"

Parcel of the manor.

Nothing can be granted by copy which is not parcel of the manor (*o*). The copyholder held originally only at will; and the poſſeſſion of the tenant at will was that of the lord. The tenements, therefore, which were held by copy were ſtill conſidered as in the hands of the lord and, conſequently, as his demeſnes (*p*).

Muſt lie in tenure.

Again; nothing can, by the very terms, be granted to be held by copy, which does not lie in tenure; for what lies not in tenure cannot be *held*: as rents, bailiwicks, fairs, commons, and advowſons in groſs, *&c.* (*q*).

Manor.

A manor, it is ſaid, may be granted by copy; though this has been much queſtioned (*r*). In the *Year-Book, M.* 32 *Hen.* 6. *pl.* 16. *fol.* 9. *b.* it is affirmed that one manor may be parcel and held of another. But it may be aſked, is not every manor that is not abſolutely held in *capite* held of another manor? And, therefore, its being *held of another* does not ſeem concluſive as to the validity of a grant by copy. But as to the

(*n*) *Co. Copyh. ſ.* 35.

(*o*) *Co. Litt.* 58. *b.* 4 *Co.* 23 *b.* 24. *b.* See *Watk. Gilb. Ten.* 313. And ſee *Ante ch.* 1. *p.* 19.

(*p*) 2 *Roll. Rep.* 236. *Cro. Jac.* 559. *Pymmock* v. *Hilder* 12 *Mod.* 147. *Winter* v. *Lovedurr*, 1 *Lord Raym.* 43, 4. *Brittel* v. *Bade*, and 1225. *Crowther* v. *Oldfield*, 1 *Salk.* 185. *Brittel* v. *Dade.*

(*q*) *Co. Copyh. ſ.* 42. *Co. Litt.* 58. *b.* See *Robinſ. Gav. b.* 1. *c.* 5. *p.* 79.

(*r*) *Co. Litt.* 58. *b.* and *N.* (2). and ſee *Cro. Jac.* 259. *The King* v. *Stanton. Gilb. Ten.* 215.

aſſertion

aſſertion that one manor may be *parcel* of another, we cannot help obſerving that ſuch a doctrine appears ſubject to much objection: the manor held by copy is held *at the will* of the lord above.

If by length of time, indeed, ſuch will is become nominal only, it can make no difference in the nature of the thing: it was originally ſtrictly at will. Now the conception of one tenant at will demiſing *a manor* to another at will ſeems rather extraordinary; as the tenants at the will of the latter would be ſubject to a double caprice (*s*). However, ſeveral manors in the kingdom are ſaid to be ſo held (*t*); and as it is not probable that any more ſhould be ſo granted, the ſubject muſt be ſuffered to reſt.

Tithes. Underwood, &c.

Tithes, it is ſaid, may be granted by copy (*u*); and underwood (*w*), herbage, &c. (*x*).

Waſte-land.

But it is alleged that it is neceſſary, in order to ſupport a grant by copy, that the thing granted muſt have been demiſed and demiſable from time whereof the memory of man is not to the contrary: hence, ſay they, a grant of waſte

(*s*) And ſee *Cro. Jac.* 260. *The King* v. *Stanton.*

(*t*) *Cro. Jac.* 327. *Moore* v. *Goodgame.* 11 *Co.* 17. *a.* S. C. under the name of Sir *Henry Nevil's.* and ſee *Year-Book M.* 32 *Hen.* 6. *pl.* 16. *f.* 9. *b.*

Ayleſham in *Norfolk* is held by copy. See *Compl. Copyh. tit Ayleſham,* &c.

(*u*) See *Watk. Gilb. Ten.* 331. and *N.* (*h*).

(*w*) 4 *Co.* 31. *a. Hoe* v. *Taylor,* and *Gilb. Ten.* 332. and *Watk.* No. CLXXVI.

(*x*) See *Co. Copyh. ſ.* 42. *Viner. Copyh.* (E.) *Comyns. Copyh.* (C. 1.)

land by copy, which was never granted by copy before, would not be good (*y*).

Yet, if lands have been granted by copy for a number of years, as 60 or 80, and it cannot be ſhewn that they were not demiſable before that time, the law will preſume that they were regularly granted; and conſider them as proper copyholds. But in this caſe, as *Calthorpe* ſays, it is not the number of years, but the memory of man, on which their nature as copyhold depends. Such a number of years would create a preſumption: but if it can be ſhewn that they were once not demiſable, then ſuch preſumption muſt give place to proof (*z*).

But we are told by Sir *Edward Coke* (*a*), that it is not of neceſſity that the lands muſt always have been actually *demiſed* time out of mind, by copy of court roll; if they were *demiſable*. ſaid he, it is ſufficient. If this then be law, what reaſon can be given why a grant by copy of waſte lands ſhould not be good, if ſufficient commonage be left for the other tenants? It is acknowledged that if a copyhold eſcheat, and the lord keep it ever ſo many years in his hands, he may again grant it by copy; and ſuch

(*y*) 1 *Leon.* 55. *Kemp & Carter.* 3 *Keble.* 124. Biſhop of *London* v. *Rowe*, *Kitch.* 81. *b.* 2 *Wilſ.* 125. *Roe* d. *Newman* v. *Newman*, 2 *Durnf. & Eaſt*, 415. *Revell* v. *Jodrell*, and ſee Lord *Hale*'s note (*a*) *to F. N. B.* 14 *D.* which cites 21 *Ed.* 3. 56. Vide 21 *Ed.* 3. *f.* 56. *a. Mich. pl.* 5.

(*z*) *Calth.* 19. 54-55. and *Watk.* N. XC. to *Gilb. Ten.* 435.

(*a*) *Co. Litt.* 58. *b.*

grant

grant will be good. (*b*). Now, on the eſcheat, the former grant was utterly at an end; and, if the lord may make a new grant (for *a new* grant it certainly would be) of the premiſes, why ſhould he not grant any other part of his demeſnes by copy?

The land formerly granted by copy was originally demeſne land, equally with any other part of the waſte (*c*). The grant of waſte-land cannot interfere with the ſtatute of *quia emptores terrarum* (*d*), for it is not within it; the copyholder holding only at will, and taking no eſtate at common law;—no portion of the tenancy.

In many manors in *England* a cuſtom is urged as enabling the lord to grant portions of his waſte-lands by copy *with the aſſent of the homage* or of a certain number of them. And in the caſe of *Hughes* v. *Games* (*e*), ſuch a cuſtom was admitted to be good; and a caſe was alſo cited in which it was ſaid to be ſo determined: and Lord Chancellor *King* there ſeems to have acknowledged the validity of ſuch a cuſtom (*f*), but ſaid that the queſtion in the caſe of *Hughes* v. *Games* was whether there was a cuſtom to do it *without* the homage? and that, ſaid his lordſhip,

(*b*) *Co. Litt.* 58. *b.* 4 *Co.* 31. *a. French*'s caſe.
(*c*) 2 *Roll. Rep.* 236. *per Ley*, C. J. and ſee *ante p.* 32.
(*d*) 18 *Ed.* 1. *Weſt.* 3.
(*e*) *Select Caſes in Chanc. Temp. King. C.* 62.
(*f*) And the author has been informed that in a caſe which came on in the common pleas, *De Grey*, C. J. intimated an opinion that ſuch a cuſtom might be good; but the caſe went off on another gound. The cuſtom was alleged as within the manor of *Hampſtead* in *Middleſex*.

muſt go to law; and then it will be for the court of law to conſider how far a cuſtom to make ſuch grants *without* the homage be a good cuſtom.

The conſent of the homage ſeems to have been neceſſary for the preſervation of their commonage, &c. but it ſhould not be forgotten that the frank-tenants, might have a right of commonage in the lord's waſte alſo. The homage of copyholders, therefore, (for frank-tenants are not of the homage in the copyhold court) cannot bind the right of the tenants who hold not by copy. The conſent of the homage does not ſeem, therefore, a ſufficient ground on which to reſt.

The tranſcendant power, indeed, of parliament may enable a perſon to grant by copy (*g*), and ſuch power has been repeatedly conferred: (*h*) but then ſuch power ſo ſpecifically given ſeems to imply that the grants would not be otherwiſe good.

Lands eſcheated &c.

By whatever means the lord accedes to the copyhold intereſt, whether in conſequence of eſcheat, forfeiture, deſcent, ſurrender, or otherwiſe (*i*); or however the copyholder takes the *manor* (*k*); Yet, as lord, he may regrant the premiſes by copy; unleſs he change the nature of the eſtate by creating a common law inte-

How the demiſable property may be deſtroyed.

(*g*) See 2 *Durnf. & Eaſt*, 425. in the caſe of *Revell* v. *Jodrell.*

(*h*) 35 *Hen.* 8. *c.* 13. 37 *Hen.* 8. *c.* 2. and 22, & 23, *Car.* 2. *c.* 3. relative to *Thornbury* in *Glouceſterſhire*, &c.

(*i*) 1 *Roll. Abr.* 498. *Copyh.* (P). 4 *Co.* 31. *a. French*'s caſe.

(*k*) See *French*'s caſe, *ubi ſup.* &c.

reſt

reſt in the lands. If he make a leaſe for years or any other eſtate by deed, the demiſable property of the premiſes would be for ever deſtroyed: but if he retain them for any length of time in his hands, he may grant them by copy again. Or if a copyhold in fee eſcheat to the lord, and he grant it to another by copy for life, he may grant the reverſion alſo by copy; or grant a new copy on the death of the tenant for life (*l*).

So, if the interruption be wrongful, as if the lord be diſſeiſed, and the diſſeiſor die ſeized, or if the land be recovered againſt the lord by falſe verdict, or erroneous judgment; in theſe caſes till the land be recovered, or the judgment reverſed by the lord of the manor, the land will not be demiſed or demiſable, and yet after the land be recontinued, it will be grantable again by copy; for *non valet impedimentum quod de jure non ſortitur effectum, & quod contra legem fit pro infecto habetur:* but if the land ſo forfeited or eſcheated before any new grant made be extended upon a ſtatute or recognizance acknowledged by the lord, or if the wife of the lord in a writ of dower have this land aſſigned to her, although theſe impediments are by acts in law, yet, inaſmuch as the interruptions are lawful, the lands can never after be granted by copy (*m*).

But if a copyhold eſcheat, and the lord *pro tempore*, who has only a particular intereſt in the

(*l*) 1 *Leon.* 56. *Kemp & Carter.*
(*m*) 4 *Co.* 31. *a. French's* caſe.

manor, make a leaſe for years or other common law eſtate which would have abſolutely deſtroyed the demiſable property of the lands, had ſuch leaſe or eſtate been made by a tenant in fee, yet ſuch lord, having only the particular intereſt in the manor, ſhall not, by his own act, prejudice him in remainder or reverſion: and therefore, although he himſelf ſhall be bound by his own act, and abſolutely precluded from granting the premiſes again by copy, yet, on the determination of his eſtate in the manor, the premiſes may be granted by copy again; for the cuſtom ſhall not be deſtroyed, as to thoſe in remainder (*n*). So, if the king leaſe an eſcheated copyhold by deed, the cuſtom ſhall not be deſtroyed; but, on the expiration of the leaſe, he may again grant it by copy: for the grant of the king ſhall not enure to a double intent as the grant of a ſubject may do (*o*).

Who may regrant ſuch eſcheated lands.

And as to the grant of lands which were once held by copy and eſcheated to the lord we may obſerve that it matters not whether they eſcheated before the acceſſion of the granting lord to the manor, or within his own time; for immediately on their eſcheating they fell into the manor and paſſed along with it, and, conſequently, might have been granted again by copy (in caſe their demiſable property was not deſtroyed by their being turned into common-law

(*n*) *Cro. Eliz.* 459. *Coneſbie* v. *Ruſkey.* 2 *Roll. Abr.* 271. *Preſcript* (T.) *pl.* 1-4. S. C. under the name of *Ruſley* and *Coneſby.* 2 *Ibid.* 196-7. *Prerogative le Roy* (G) *pl.* 3. 4. *Cremer* and *Burnett.* & *N.* (7) to *Co. Litt.* 58 *b.*

(*o*) *Cremer* and *Burnett, ubi ſup.* and *Gilb. Ten.* 394.

eſtates

eſtates) by any lord who acceded to the manor, however trifling his intereſt, provided his intereſt were lawful (*p*).

Again, if a copyholder accede to the manor, and his copyhold be, in conſequence, extinguiſhed, he may grant it again by copy (*q*) equally as the lord originally entitled to the manor might have done in caſe the copyhold had eſcheated or been ſurrendered to his uſe: for it matters not whether the manor come to the copyholder, or the copyhold come to the lord.

If the lord have only a particular intereſt in the manor, he may grant by copy, though the eſtate ſo granted by him may not only continue longer than his own eſtate in the manor, but even if the eſtate ſo granted may eventually not come into poſſeſſion during the exiſtence of his own eſtate: thus, a tenant for life, (*r*) in dower, (*s*) or guardian, (*t*) and ſeemingly by the better authority as well as from the reaſon of the thing, a leſſee for years (*u*) may ſo grant in reverſion, though the grant may not take effect in poſſeſſion till their own intereſt be determined.

Grant in reverſion.

But it has been ſaid that a lord cannot grant a copyhold in reverſion without a ſpecial cuſtom empowering him ſo to do: yet it is obſervable

(*p*) See Sir *Wm. Jones*, 449. *Lee* and *Bothby*. 1 *Keb.* 720. S. C. *Cro. Car.* 521. S. C. 4 *Co.* 31. *b. French*'s caſe.

(*q*) *Moore* 185. *pl.* 330. *Hide* and *Lyon*. 4 *Co.* 31. *b.* S. C. *Hut.* 65. *Blemmerhaſſet* v. *Humberſton*. Sir *W. Jones*, 41. S. C.

(*r*) *Calth.* 99.

(*s*) *Cro. Eliz.* 661. *Gay* and *Kay*.

(*t*) 2 *Roll. Abr.* 41. *Gardien* (2) *pl.* 3. *Shapland* and *Ridler*. 2 *P. Wms.* 122.

(*u*) See *Gilb. Ten.* 204

that moſt, if not all, the books which aſſert this doctrine are evidently, and for the moſt part avowedly, founded upon the looſe note in *March*, (*w*) and the caſe mentioned in *Leonard* (*x*) and *Godbolt* (*y*). The firſt of which does not appear to be any more than a *dictum*; and ſo Chief Baron *Comyns* (*z*) conſidered it; and in the latter the juſtices would give no opinion on the point. And the caſe of *Plimpton* v. *Dobynet*, in *Gouldſborough* (*a*) is alſo inconcluſive, though it ſeems to be againſt the validity of ſuch cuſtom. A cuſtom to reſtrict the lord, who might have granted a copyhold in poſſeſſion in fee, appears, as Chief Baron *Gilbert* obſerves (*b*) to be very unreaſonable. If, indeed, the cuſtom goes only to reſtrain the particular tenant from granting in reverſion it might, as he remarks, be reaſonable enough. But we muſt certainly have a better authority than that in *March* before we affirm that even a lord having a particular intereſt, would require a cuſtom to *enable* him to make ſuch a grant, though a cuſtom to *reſtrict* him might poſſibly be good.

The premiſes granted muſt be held "by copy of court roll."

Fifthly, The premiſes granted muſt be held "*by copy of court roll*;" for this is an eſſential in this ſpecies of tenure. It is not enough to allege that certain premiſes are held "according to the cuſtom of the manor," but they muſt be expreſsly ſhewn to be held "by

(*w*) *March. Rep. Temp. Car.* 6. *pl.* 13.
(*x*) 3 *Leon.* 226. *pl.* 13.
(*y*) *Godb.* 140. *pl.* 171.
(*z*) *Comyns's Dig. Copyh.* (C. 12.)
(*a*) *Gouldſb.* 102. *pl.* 8.
(*b*) *Ten.* 322.

copy

copy of court roll alſo:" (*c*) and on the other hand it is not enough to affirm that they are held "by copy of court roll," without ſhewing alſo that they are held "at the will of the lord;" (*d*) for otherwiſe they may be only cuſtomary freeholds.

And it is obſerved by Lord *Coke*, (*e*) that there is no tenant in the law that holds by copy but only this kind of cuſtomary tenant; for no man, ſays he, holds by copy of a charter, or by copy of a fine; but this tenant holds by copy of court roll.

Sixthly, they are to be held "at the will of the lord, *according to the cuſtom of the manor*:" under the preceding branch of our definition we have noticed the neceſſity of alleging that the copyholder holds "at the will of the lord." The copyholder was, originally, ſtrictly and merely a tenant at will. He was ſolely indebted to the munificence of his lord for his lands; and his lord might have reſumed them at pleaſure. While the tenant, however, conducted himſelf faithfully and fulfilled his conditions and returns, he was ſuffered to continue in the poſſeſſion of the eſtate. If indeed he failed in theſe, his intereſt of conſequence, became forfeited to the lord.

—"at the will of the lord, according to the cuſtom of the manor."

Of the eſtate of the copyholder,

When the tenant died, his children, dependant upon their induſtry in ruſtic employs for

and progreſs of copyholds.

(*c*) 3 *Bulſtrode*. 230. *Elkin* and *Waſtell*.

(*d*) *Cro. Car*. 229. *Hughes* v. *Harrys*. *Carth*. 432. *Gale* v. *Noble*. *Co. Copyh. ſ.* 32. *Tr. p.* 58. *Blackſt. Tracts*, Conſid. on Copyholders, and 2 *Comm*. 149. *ch*. 9.

(*e*) *Co. Litt*. 57. *b*. *Co. Copyh. ſ.* 32. *Tr. p.* 57.

ſuppor

ſupport, and bred up under the protection and in the intereſt of their lord, were often permitted to retain the ſpot which their father had cultivated; and ſucceeded on the conditions under which he had held them. This ſeemed reaſonable and juſt. It was conceived hard to deprive the children of a faithful vaſſal of the ſcanty pittance they might reap from ſucceeding him. This became, therefore, frequently practiſed; and in many manors, this ripened into cuſtom. The common law, always friendly to freedom, countenanced every meaſure which favoured it, and which tended to make the tenant leſs dependant on his lord. The conditions on which the vaſſal held his copyhold, became in time fixed in their nature, though perhaps not always ſo in their duration and extent, and it thence became uſual to grant ſuch an intereſt to the tenant and his heirs, yet ſubject to the right of reſumption by the lord. The tenant notwithſtanding ſuch deſcendible eſtate, was ſtill therefore ſaid to hold at the lord's will; and his heir was neceſſitated to be regularly admitted to the tenancy. He acknowledged the gift, and was grateful for the renewed munificence of the lord. He accepted the ſeiſin and paid his fine. Should the lord indeed, have required an exorbitant fine, the heir would have been diſinherited; but this the law at length prevented, and confined his demands within the limits of juſtice, and regulated them by the value of the lands to which the heir ought of right to ſucceed. As the tenant held only at will, at leaſt in the conſideration of law, he could not transfer

ſer his intereſt to another; at the moſt, he could only relinquiſh his own right to the premiſes. He therefore returned them to his lord. When a copyholder wiſhed to transfer his eſtate, he communicated thoſe wiſhes to the lord, who often complied with his requeſt, and accepted his reſignation under confidence to regrant the eſtate to the perſon he was deſirous ſhould ſucceed him (*f*). This alſo becoming more frequent, and the connection every day relaxing between the lord and his tenant, the returns and duties becoming more fixed and certain, and the advantages of alienation perpetually preſenting themſelves, the law countenanced the uſage, and often enforced its compliance. Still however a regular reſignation, or ſurrender, by the old tenant, and a regular acceptance or admiſſion of the new, were requiſite. And this form muſt to this day be adhered to (*g*).

Thus has the law ſupported and ſtrengthened the eſtate of the tenant, though it ſtill regards him as holding at the will of the lord. But the tenant has long ceaſed to be ſubject to his caprice. The grant indeed by the lord is ſolely dependent on his option. The lord cannot be compelled to grant (*h*); for this were to deprive

(*f*) In early times freeholds were frequently ſo transfered, *Vide Mad. Form. Angl.* No. C. *Mad. Bar. Anglica. B.* 3. *c.* 4. *p.* 230. *Dalrymp. F. P. c.* 6 *ſ.* 1. *p.* 232.

(*g*) *Watk.* No. LXVI. to *Gilb. Ten. p.* 407-9.

(*h*) *Moore* 788. Lord *Greye's* caſe. *Watk.* No. LXXXI. to *Gilb. Ten.* 413.

But

prive him of the ownerſhip of his property. The lord can be no more obliged to grant a portion of his demeſnes to another than to convey the manor itſelf to a ſtranger. He may do either if he pleaſes; but he is not compellable to grant at all.

If however, he chooſes to grant a portion of his demeſnes to a perſon to be held by copy, his election is made. From the very time of the grant, and in conſequence of the very act, the copyholder ceaſes to be a mere tenant at the will of his lord: he is no longer ſubject to his caprice. The lord has granted him his eſtate; and the law has eſtabliſhed it. The abſolute controul of the lord has fled; and the tenant is in by the cuſtom. Hence he is no longer ſaid to hold merely "at the will of the lord," but "at the will of the lord *according to the cuſtom of the manor.*" But though the copyholder's intereſt is thus eſtabliſhed, he is ſtill conſidered, as to many purpoſes, as a tenant at will; though that will be circumſcribed and controuled by the cuſtom. The freehold of the premiſes remains in the lord (*i*); and the poſſeſſion of the copyholder is regarded as the

The copyholder is in by the cuſtom.

But a cuſtom for a tenant for life to name his ſucceſſor is good, for this is a *quaſi* fee. 1 *Rol. Abr.* 560. *Cuſtomes* (E) *pl.* 18. and (H) *pl.* 1. *Rawles* and *Maſon.* 2 *Brownl.* 85. 192. S. C. 1 *Roll. Rep.* 48. *Crabb* and *Bevis*, cited. 4 *Leon.* 238. *Ball's* caſe. *Preced. Chanc.* 3 *Deveniſh* v. *Baines*, and ſee 2 *Durnf.* and *Eaſt*, 746. *Mardiner* v. *Elliott.* See *poſt. ch.* 7. of Fines.

(*i*) *Litt. ſ.* 81. And ſee 3 *Burr.* 1273. *Stephenſon* v. *Hill.*

lord's

lord's poſſeſſion, and ſhall, conſequently, cauſe a *poſſeſſio fratris* in him (*k*). While, however, the tenant renders his ſervices and does no act which may amount to a forfeiture of his tenancy, he cannot be deprived by the lord of his intereſt in the lands. The lord cannot reſcind his eſtate: he cannot determine his will: and if the tenant has a tranſmiſſible intereſt, he is compellable to admit the heir or other perſon entitled by law. Should the lord preſume to remove him from his lands, or even to enter on them, the tenant may have his action of treſpaſs (*l*); or even indict him (*m*); according to the meaſure of his offence.

Immediately on the grant being made, the tenant is in by the cuſtom. Hence the eſtate of the lord need not be commenſurate with that of the tenant; the former is not merely derived from the latter. Hence a tenant at will of the manor may grant a copyhold to a ſtranger in fee (*n*). The copyholder ſhall be in by the cuſtom, and paramount the intereſt of the granting lord. Hence the eſtate ſo granted to be held by copy ſhall not be ſubject to his charges or incumbrances (*o*).

And his eſtate ſhall not be ſubject to the lord's charges.

If a copyhold eſcheat, and the lord grant a rent-charge or acknowledge a ſtatute, and then regrant the copyhold; the rent or ſtatute will not affect the copyhold: but the tenant ſhall be

(*k*) *Watk. on Deſc. c.* 1. *ſ.* 1. *p.* 51.
(*l*) See *Co. Litt.* 60. *b.*
(*m*) See *Gilb. Ten.* 329.
(*n*) 4 *Co.* 23. *b.* 6 *Co.* 60. *b.*
(*o*) See 8 *Co.* 63. *Swayne's* caſe.

in

The uſual ſervices and returns muſt be reſerved.

Seventhly, The copyhold muſt be granted "*under the uſual ſervices and returns.*"

It was ſaid by *Ley*, C. J. in the caſe of *Smith* v. *Reynard*, (*d*) that when copyhold lands come into the hands of the lord by eſcheat or forfeiture, the lord may grant thoſe lands by copy rendering (or reſerving) a greater rent. But Sir *Edward Coke* lays it down in expreſs terms (*e*) that the moſt trivial variation muſt not be made from the ancient ſervices, elſe the heir may avoid the grant: nay, if the ancient rent were expreſsly reſerved in gold, and, on the new grant, it be reſerved in ſilver, it would be fatal; or if two copyholds eſcheat, the one uſually demiſed at twenty ſhillings rent and the other at ten, and the lord grant them both, rendering thirty ſhillings, it would not be good. And this doctrine of Lord *Coke*'s is adopted in its fulleſt extent by Mr. Juſtice *Blackſtone* (*f*); and alſo by the late Chief Baron *Gilbert* (*g*) who reaſons that as there is nothing but cuſtom to warrant the grant by copy, ſo it ought to be ſtrictly purſued as to the eſtates, cuſtoms, ſervices and tenure, elſe it is not the eſtate that was demiſed before: and though he conceived that if there were a copyhold in fee, the lord might releaſe part of the ſervices and not do any prejudice to the copyholder's eſtate, (for there would then be an eſtate in being which would

(*d*) 2 *Roll. Rep.* 236.
(*e*) *Co. Copyh. ſ.* 41. and ſee *Cro. Eliz.* 699, 700. *Harris* and *Jay*, and *poſt. ch.* 6.
(*f*) 2 *Comm.* 370. *ch.* 22.
(*g*) *Ten.* 198.

appear

appear to have been the old eſtate,) yet, when the lord grants a new eſtate by copy, ſince it is an eſtate againſt common right and warranted only by cuſtom, ſuch cuſtom muſt be ſtrictly purſued in order to bind the heir.

Form of a Grant.

If the grant be out of court let a memorandum be thus made:—

Manor of Fairhurſt. BE IT REMEMBERED that on this, the Day of in the year of our Lord, &c. I, *M.* Earl of *B.* lord of the manor of *Fairhurſt* aforeſaid, HAVE granted unto *C. D.* of *&c.* and his heirs ALL that meſſuage *&c.* ſituate, *&c.* and within, and parcel of, the ſaid manor, which were heretofore in the poſſeſſion of *A. B.* and held by him of the ſame manor by copy of court roll, *&c.* and on his deceaſe eſcheated for want of heirs; AND that I have alſo given unto the ſaid *C. D. ſeiſin* thereof by the rod; TO HOLD to him, the ſaid *C. D.* and his heirs, by copy of court roll, at the will of the lord, according, &c. by the ſame rents, cuſtoms and ſervices as the ſame meſſuage, *&c.* have been heretofore held. AND the ſaid *C. D.* gave for a fine 100*l.* but his fealty was reſpited.

If in court, ſay,—

ALSO AT THIS COURT the lord of the ſaid manor, by his ſaid ſteward, granted unto *C. D.* ALL *&c.* AND the ſaid *C. D.* being preſent in court in his proper perſon, praved ſeiſin of the ſaid, *&c.* WHEREUPON the lord by his ſaid ſteward granted ſeizin thereof by the rod, *&c.*

CHAP. III.

Of SURRENDERS.

Nature of

A Copyholder being in conſideration of law but a tenant at will, he had no intereſt which he could transfer to another; he could only relinquiſh his own right to the premiſes. When he was, therefore, deſirous that another ſhould ſucceed him in the tenancy, he ſurrendered or returned the poſſeſſion to the lord under confidence that he would regrant the premiſes to the perſon he himſelf ſhould deſignate. If the lord accepted ſuch reſignation under ſuch confidence the Court of Chancery enforced the truſt. This power, thus aſſumed by the Courts of Equity, ſeems coeval with the introduction of uſes with reſpect to freeholds. Though ſeemingly new in the time of *Edward* the Fourth, it was generally acquieſced in, as it opened the way for the alienation of copyhold as well as of freehold eſtates; and the connection between the lord and tenant every day relaxing, and the returns and duties becoming more certain and fixed, the law countenanced the uſage (*h*).

Before the ſtatute of *quia emptores terrarum* this was an uſual mode of conveying freehold

(*h*) See *Watk. Gilb. Ten.* 408. No. LXVI. 410. No. LXIX. and 2 *Bl. Comm.* 366. *ch.* 22.

eſtates

tates. Many instances re her his
transferred, even through ver,
ng (i). is
Copyholds being still co
ates at will, they can only
urrender or resignation m
unt to the lord, and a ne
e to the person who wish
(k).

his mode, indeed, is now considered as a
(l); but even as a form it is, generally
king, indispensible. A copyhold cannot
erly be transferred by any other assurance;
offment or grant will have that operation.
would exchange a copyhold estate with
er, I cannot do it by an ordinary deed of
nge at the common law, but we must sur-
to each others use, and the lord will ad-
accordingly. If I would devise a copy-
I must surrender it to the use of my last
d testament; and in my will I must de-
my intentions, and name a devisee who
en be entitled to admission (m).

power of alienation in the copyholder is
however, so established that the lord is
lable, not only by *subpœna* in equity but

(i) *Mad. Bar. Angl. b.* 3. *c.* 4. *p.* 230. (*b*). *Mad. Form. Angl.* No. C. *Watk.* No. LXVI. to *Gilb. Ten.* 408. and see *Dalrymp. F. P. ch.* 6. *s.* 1. and *ante. ch.* 2.

(*k*) *Watk. Gilb. Ten.* No. LXVI. and LXIX. 4 *Co.* 22. *a.*

(*l*) See *Watk. Gilb. Ten.* No. LXX.

(*m*) 2 *Bl. Comm.* 367. *ch.* 22.

 by

mandamus at law, to admit the perſon nominated by the former tenant (*n*).

The manner in which a copyhold is ſurrendered, is this; the tenant, either in perſon or by attorney, yields or returns the ſeiſin or poſſeſſion of the premiſes to the lord, or his ſteward, or to certain tenants, according as the cuſtom is, by re-delivering or returning the ſymbol of ſeiſin by which he was admitted (*o*), as a relinquiſhment of the premiſes as to himſelf; and, if it be not intended for the immediate benefit of the lord, at the ſame time deſignating the perſon who is to be inſtituted into the tenancy. It is thus entered on the roll:

Entry of in the roll.

"AT THIS COURT came *I. S.* one of the copyhold or cuſtomary tenants of this manor, and ſurrendered into the hands of the lord by the rod" (or other cuſtomary ſymbol, as the uſage may be) "and acceptance of the ſaid ſteward, according to the cuſtom of the ſaid manor, all that copyhold meſſuage, *&c.* now in the occupation of, *&c.* and of which he the ſaid *I. S.* at the time of making the ſurrender, was ſeized in fee (*p*), at the will of the lord, according to the

(*n*) *Poſt. ch.* 6. Of Admiſſion.

(*o*) *Poſt. ch.* 6. Of Admiſſion.

(*p*) Though a ſurrender paſſes only that eſtate which the copyholder has in himſelf and may lawfully paſs, yet, if the uſes to which the ſurrender is made, are more extenſive than ſuch eſtate, and the lord admits the ſurrenderee according to the uſes declared, the admittance may operate as a new grant. It is, therefore, adviſable to expreſs the eſtate which the ſurrenderor has in the premiſes in order to prevent an impoſition or error. For ſhould the expreſſed eſtate

the cuſtom of this manor; [and all other his copyhold or cuſtomary tenements whatſoever, holden of the manor aforeſaid:] and all his eſtate, right, title, intereſt, uſe, truſt, benefit, claim and demand (*q*) of, in, to, or out of, the ſame or any part thereof; *to the uſe and behoof of, &c.*"

A ſurrender, therefore, may be thus defined: "The yielding up of an eſtate by the tenant to the lord, either as a relinquiſhment or reſignation of ſuch eſtate, or as the mean of conveying or transferring it to another." Defined.

Firſt then, it is "*the yielding up* of an eſtate."

This muſt be apparent from what has been already obſerved; but we ſhall here enquire into what the law conſiders as amounting to the yielding up, or ſurrendering of a copyhold: and ſuch yielding up or ſurrendering of a copyhold may be either by expreſs words or by implication of law. What ſhall amount to a ſurrender.

Sir *Edward Coke* affirms that the word *ſurrender* is *vocabulum artis*; and therefore, where a ſurrender is needful, if this one word be wanting, all other words uſed in ordinary con-

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eſtate not be commenſurate with the uſes declared the matter would be apparent.

See *Watk. Gilb. Ten.* 255. 257. 451-3. No. CXIX. CXX. 4 *Leon.* 88. *Ca* 186. 1 *Freem.* 246.

(*q*) It is often proper to inſert the words "all the eſtate, right, &c." as they may operate as a *grant* or *releaſe* of the right, when the tenant has, in reality, only a right to or an equity in the premiſes. See 2 *Vern.* 16. *Spindlar* and *Wilford*, and *poſt. p.* 61.

veyances, ſays he, are ineffectual and inſufficient to convey any copyhold eſtate; for if a copyholder come into court, and offer to paſs his copyhold by word of grant, of gift, of bargain and ſale, or ſuch like, I doubt he will fail of his purpoſe: for as he is tied to a ſingular form of aſſurance, ſo is he reſtrained to peculiar words in his aſſurance (*r*).

Yet he tells us in the ſame ſection that a ſurrender (where, by a ſubſequent admiſſion, the grant is to receive its perfection and confirmation) is rather a manifeſting of the grantor's intention, than the paſſing away any intereſt in the poſſeſſion. And it ſhould ſeem from other books that any words manifeſting ſuch intention will operate as a ſurrender, provided it be not prejudicial to the rights of third perſons (*s*).

There is, indeed, much obſcurity, and ſeemingly, inconſiſtency in the books with reſpect to this ſubject; though there are ſeveral diſtinctions laid down which ſeem to have been relied on, that ſhould not here be forgotten. When the lands are to paſs for the lord's immediate benefit, "a ſmall matter will ſuffice to throw them into his hands (*t*):" but the law will be more ſtrict, and inſiſt more ſtrongly on the compliance with form, where the ſurrender, if well made, will be the mean of conveyance to a ſtranger; and, laſtly, it

(*r*) *Copyh. ſ.* 39.

(*s*) *Gilb. Ten.* 252. 311. Sir *Thomas Jones's Rep.* 142. *Zinzon* v. *Talmaſh.*

(*t*) 2 *Show. Rep.* 131. *Zinzon* v. *Talmaſh.*

will

will not diſpenſe with a particle of the form, where it is to operate to the deſtruction of a third perſon's right.

As to the firſt and ſecond caſes, it has been held, that if the copyholder uſe the words *bargain* and *ſell*" inſtead of "ſurrender" it will be ſufficient to *extinguiſh* his copyhold for the benefit of the lord (*u*); but that thoſe words will not operate as a ſurrender ſo as to benefit a ſtranger; for in that caſe the heir of the copyholder may avoid it (*w*).

When the intereſt of third perſons is affected, the ſurrenderee is, with more propriety, reſtricted to the preſcribed terms. Thus on a grant for lives *ſucceſſive*, with a cuſtom for the firſt taker to deſtroy the whole eſtate by ſurrendering into the lord's hands; if the firſt taker join with the lord *in levying a fine* of the lands to the uſe of others, the fine ſhall not operate as a ſurrender ſo as to ſatisfy the cuſtom and defeat the limitations over to the other lives (*x*).

In inſtances, however, where the rights of other perſons are not prejudiced, it ſhould ſeem the better opinion, as well by the greater number of caſes as the reaſon of the thing, that any words expreſſive of the intention of the copyholder to return the copyhold into the lord's hands for the purpoſe of its being conveyed to a ſtranger, will be a ſufficient ſurrender in law.

(*u*) *Hutton* 65. *Blemmerhaſſet* v. *Humberſtone*. Sir *W. Jones's Rep.* 41. S. C.

(*w*) *Calth.* 57. See *Co. Copyh. ubi ſup.*

(*x*) 2 *Show. Rep.* 130. *Zinzon* v. *Talmaſh*. Sir *T. Jones*, 142. S. C. 1 *Freem.* 263. S. C.

Calthorpe ſays, that if a copyholder come into court and tell the lord that, for the preferment of his ſon in marriage, his will is to give his land preſently to his ſon, and deſire the lord to be contented therewith, and the ſame be recorded or found by the homage as a ſurrender, and ſo preſented, it would be a good ſurrender, without other words (*y*). So, if in court he deſire the lord to admit his ſon to be tenant in his father's place, he ſays, this ſeems a good ſurrender to the ſon (*z*).

If a copyholder come into court and ſay that he "is weary of his copyhold," and requeſt the lord to take it (*a*); or if he *reſign* his intereſt, in court, into the lord's hands, to do therewith his will (*b*); it will be a good ſurrender; but in theſe caſes the ſurrender operates as an *extinguiſhment*.

But it is ſaid that if a copyholder *renounces* his copyhold (*c*), or declares that he will be no longer the lord's tenant (*d*), though the words be recorded, it will be no ſurrender.

But ſurely if the word ſurrender be not *vocabulum artis*, be not abſolutely, in any inſtance, indiſpenſible, there cannot be an inſtance in which it would be leſs wanted than in theſe. Is not the copyhold in theſe caſes ſolemnly

(*y*) *Readings*, 59.
(*z*) *Calth.* 57,-8.
(*a*) *Hutt.* 65.
(*b*) *Calth.* 58.
(*c*) 1 *Roll. Abr.* 502. (L.) *pl.* 2. See *Kitch.* 124. *b.*
(*d*) *Calth.* 58. See *Kitch.* 124. *b.*

reſigned,

reſigned, relinquiſhed, and abandoned? and is it not ſaid, with reſpect to extinguiſhment, that "a ſmall matter ſuffices to throw it into the lord's hands"? And Chief Baron *Gilbert* infers, that as a copyholder is only a tenant at will, any thing amounting to a determination of that will, on the part of the copyholder, will be ſufficient to extinguiſh his copyhold (*e*).

Yet words ſpoken by a copyholder muſt be expreſſive of an actual and immediate relinquiſhment of the premiſes to amount to a ſurrender, for if he only ſays he is *content* to ſurrender, or the like, he only expreſſes an intention of doing ſo at ſome future time; which will not be a ſurrender in law (*f*).

So, if a copyholder *covenant* to ſurrender (*g*); though the covenant be preſented by the homage (*h*).

But we may here obſerve that thoſe words which, if ſpoken in court would amount to a ſurrender, will amount to a ſurrender when ſpoken out of court before a perſon who is authoriſed to take a ſurrender out of court: but words ſpoken before indifferent perſons, or in common converſation, or in anger, &c. cannot amount to a ſurrender of copyholds (*i*).

(*e*) *Gilb. Ten.* 301.

(*f*) *Calth.* 58. *Gilb. Ten.* 252.

(*g*) See 2 *Show.* 131. *Zinzon* v. *Talmaſh.*

(*h*) 2 *Durnf.* and *Eaſt.* 484. The *King* v. The Lord of the Manor of *Hendon.*

(*i*) See *Gilb. Ten.* 273-4. and *Watk.* No. CXV. *p.* 450.

That

Surrender by implication.

That a copyhold may be ſurrendered by implication is now indiſputably eſtabliſhed, however it was doubted in former times.

If a copyholder in fee comes into court and accepts a new copy, to himſelf for life, remainder to his wife for life, remainder to his ſon for life; this is tantamount to, or implies a ſurrender to the uſe of himſelf for life, &c. But the reverſion continues in him (*k*): for had an actual ſurrender been made, no more would have paſſed than would have ſatisfied the uſes declared (*l*); and no further ſurrender ſhall be implied than is requiſite to give effect to the new uſes or eſtates.

What may be ſurrendered.

Secondly, A ſurrender "is the yielding up *of an eſtate*." Nothing can, properly, be the ſubject of a ſurrender but a legal intereſt. A ſurrender is the relinquiſhment of the *tenancy*; or at leaſt the returning of that portion of the ſeiſin, which reſts in the perſon who is about to ſurrender.

A reverſion or remainder

But it is not neceſſary that ſuch perſon have an eſtate in *poſſeſſion*; it is enough if it be *remainder or reverſion*; for the perſons in remainder or reverſion equally are in the ſeiſin of the fee (*m*). A remainder or reverſion, therefore, is equally the ſubject of a ſurrender.

Reverſioner being in of his old ſeiſin,

If a copyholder in fee ſurrender for a leſs eſtate, as to *A.* for life, he may enter on the

(*k*) *Gilb. Ten.* 254.
(*l*) See *Watk.* No. CXVI. to *Gilb. Ten. p.* 450.
(*m*) See *Butl. Addit. Notes to Co. Litt.* 266. *b. N.* (1).

determination

determination of *A*'s eſtate; as he continues in of his old ſeiſin (*n*): If a copyhold be limited to one perſon, with remainders over to others, the admiſſion of the particular tenant gives ſeiſin or admiſſion alſo to the remainder men (*o*): the reverſioner or remainder man, therefore, being in the ſeiſin, may ſurrender that reverſion or remainder to another, without a perſonal admittance of themſelves (*p*).

Or remainder man on admiſſion of the particular tenant, may ſurrender;

But the ſurrenderee of a reverſion or remainder cannot properly ſurrender before his own admiſſion; for before ſuch admiſſion he is not in the ſeiſin; having never been accepted as a tenant (*q*).

but not the ſurrenderee of a reverſion, &c. before his own admiſſion.

The heir of a reverſioner or remainder-man may, indeed, ſurrender before his own admittance on ſatisfying the lord for his fine (*r*); but this is no more than an heir of a perſon who was actually poſſeſſed might have done (*s*). As the heir, in each of the three inſtances, has a legal intereſt in the premiſes, the actual admittance is only for the ſecurity of the lord's fine; if that fine be ſatisfied it is enough; the admiſſion of the heir, is not eſſential to eſtabliſh *the heir's* title ſo as to enable him to ſurrender. But this is only a *diſpenſation* of the admiſſion;

Heir of reverſioner &c. may ſurrender, on ſatisfaction of fine.

(*n*) 9 *Co.* 107. *a.* and ſee *poſt. ch.* 6. of Admiſſion, and *ch.* 7. of Fines.

(*o*) See *poſt. ch.* 6. Of Admiſſion.

(*p*) *Cro. Eliz.* 504. *Gyppen* v. *Bunney. Ibid.* 662. *Colchin* v. *Colchin.* 3 *Leon.* 239. *Butler* & *Lightfoot.* 4 *Ibid.* 9. S. C. and 4 *Ibid.* 111. *Hegget* v. *Felſton.*

(*q*) See *poſt. p.* 60.

(*r*) *Cro. Eliz.* 504. *Gyppen* v. *Bunney.*

(*s*) 4 *Co.* 22. *b.* and *poſt. ch.* 9.

and

and not that ſtrictly the heir is tenant, or poſſeſſed of an eſtate which is the proper object of a ſurrender, independantly of ſuch admiſſion.

What cannot be ſurrendered.

Where a perſon, therefore, is not in the ſeiſin, he cannot properly ſurrender. If he has only an equity, or right, or authority, or in ſhort, any claim which lies not in tenure (*t*), he muſt paſs it by another mode of conveyance. The perſon having the legal poſſeſſion, is the tenant to the lord; and how frequently ſoever ſuch right, equity, &c. be transferred, the *tenancy* will remain unaffected.

An equitable intereſt;

An equitable intereſt in copyholds, therefore, may be aſſigned or deviſed without a ſurrender (*u*).

An authority or power.

So, if an authority or power be given to a perſon, he may exerciſe it; and the vendee or appointee ſhall be in by the original inſtrument without a new ſurrender to his uſe (*w*).

Surrenderee cannot ſurrender before admiſſion.

So, if a ſurrender be made to the uſe of a ſtranger, that ſtranger cannot before his own admittance ſurrender to the uſe of another. The ſurrenderor continues tenant to the lord. If indeed the lord accept the ſurrender of the *ceſtui que truſt*,

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(*t*) *A fortiori*, if the perſon has no claim at all; as an heir in the life of his anceſtor; for a ſurrender ſhall not operate as an eſtoppel. See 3 *Durnf* and *Eaſt.* 365. *Goodtitle* v. *Morſe.* and 6 *Ibid.* 63. *Doe* d. *Ibbott* v. *Cowling & Ux.* 1 *Anſtruther* 11. *Morſe* v. *Faulkner & al.*

(*u*) 1 *Atk.* 388. *Hawkins* v. *Leigh, & al. Ibid.* 389. *Macey & al.* v. *Shurmer.* 2 *Ibid.* 38. *Tuffnell* v. *Page.* 3 *Ibid.* 73. *Car* v. *Elliſon.* 1 *Veſ.* 121. *Allen* v. *Poulton. Ibid.* 490. *Gibſon* v. Lord *Montfort.* and ſee 1 *Hen. Blackſt.* 461. *Roe* v. *Lowe.*

(*w*) 2 *Wilſ.* 400. *Holder* d. *Sulyard* v. *Preſton. Cro. Jac.* 199. *Beal & Shepherd.*

it

it may be *an implied admiſſion on the firſt ſurrender* (*x*).

If a copyholder ſurrender to another on condition, who is thereupon admitted, he may *releaſe* the condition by deed (*y*): for the tenancy is already full. Releaſe of condition.

So, one joint tenant may releaſe to his companion (*z*); or he may *ſurrender* to him, as the ſurrender is through the intervention of the lord, and ſo not like the ſurrender of a joint tenant of freehold. But by ſuch ſurrender the joint tenancy is ſevered, and the ſurrenderee ſhall not be in on the original grant, but by his companion (*a*). Releaſe by joint tenants.

If a perſon be wrongfully admitted, he who has the right may releaſe it (*b*); but ſuch right is not the ſubject of a ſurrender. If, indeed, the perſon having right ſurrenders it, ſuch his act, though it will not operate as a ſurrender, may operate as a releaſe, and ſo be ſufficient to paſs it (*c*). Releaſe of right.

There cannot properly be a diſſeiſin of a copyholder; for the freehold is in the lord: If any one, therefore, enter "with ſtrong hand" into a copyhold, he does not uſurp the ſeiſin; nor, conſequently, become a *tenant*. He cannot, therefore, ſurrender (*d*). The perſon having right continues tenant to the lord; and *he* A perſon entering by wrong cannot ſurrender; but the perſon having the right may do ſo.

(*x*) See *Gilb. Ten.* 275. 281. *&c.* and *Watk.* No. LXXV. *p.* 163. and CXXX. *p.* 457. and *poſt.*
(*y*) *Cro. Jac.* 36. *Hull* and *Shar-brook.*
(*z*) *Co. Lit.* 59. *a.* N. (2).
(*a*) *Kitch.* 86. *a. Co. Copyh. ſ.* 35. *p.* 79.
(*b*) 4 *Co.* 25. *b. Kite* and *Quienton's* caſe.
(*c*) 2 *Show. Rep.* 82. *Stone* and *Exton.* and *ante* 53. (*q*).
(*d*) 2 *Mod.* 32. *Keen* v. *Kirby.*

may

may enter and ſurrender the eſtate. So, if he die, his heir may enter and ſurrender (*e*).

So he may enter on a perſon wrongfully *admitted and ſurrender.*

So, if the lord ſeize the copyhold wrongfully and grant it to another, and he be accordingly admitted; the rightful copyholder may ſurrender on his entry (*f*); or he may releaſe his right, as before obſerved (*g*): though he cannot releaſe to a diſſeiſor, as the diſſeiſor is not tenant to the lord (*h*).

A rent cannot properly be ſurrendered.

A rent cannot properly be held by copy (*i*), nor, conſequently, be properly ſurrendered (*k*), except as incident to the reverſion (*l*): but an act purporting to be a ſurrender may operate ſo far as to paſs it in equity, as a grant, or evidence of an agreement for its ſale, (*m*).

Who may ſurrender.

Thirdly, a ſurrender "is the yielding up of an eſtate by the *tenant*." And here we may enquire, *by whom* ſuch ſurrender may be made?

Every perſon having ſuch an *eſtate* as may be the ſubject of a ſurrender, muſt be preſumed capable of making ſuch ſurrender; and therefore, if they are not, it muſt be from a *perſonal* incapacity; as by being under age, covert, or the like.

Who not.

(*e*) *Cro. Jac.* 36. *Joyner* and *Lambert.*

(*f*) For on his entry he would be in of his former ſeiſin, See *Co. Copyh. ſ.* 56. *Tr.* 129.

(*g*) See before *p.* 61. (*b*).

(*h*) 1 *Leon.* 102. *Wakeford's* caſe.

(*i*) See *Co. Copyh. ſ.* 42. *Tr.* 97. *Calth.* 54. *Gilb. Ten.* 331.

(*k*) 2 *Vern.* 16. *Spindlar* v. *Wilford, & al.*

(*l*) See 1 *Leon.* 315. *Auſtin* and *Smith.*

(*m*) *Auſtin* and *Smith.* *Spindlar* and *Wilford*, as before.

And

And *firſt*, as to the ſurrender of an infant: the act of an infant ſhall not prejudice him: if therefore, he make a ſurrender, he may enter at full age without ſuit; though the ſurrenderee be admitted (*n*). Surrender by an infant;

But an infant may be ordered by the court of Chancery to ſurrender a copyhold which he has as a truſtee or mortgagee (*o*). by order of chancery.

Secondly, as to *femes coverts*. Femes covert.

Huſband and wife may, together, ſurrender the wife's lands; ſhe being, on ſuch ſurrender, examined apart by the ſteward (*p*): though ſuch ſteward be only by parol; and that without any ſpecial cuſtom to warrant it (*q*). So the ſteward may depute another to take ſuch ſurrender and to examine the feme covert (*r*). So her examination may be taken on a ſurrender out of court by two tenants, if there be a ſpecial cuſtom, but not otherwiſe (*s*). Huſband and wife. Examination of wife.

As the huſband becomes, on marriage, entitled to the profits of the wife's copyholds, during her life, and often, by cuſtom, during his Wife alone.

(*n*) *Moore.* 597. *Gooles* v. *Grane.* *Popham* 39. *Bullock* v. *Dibler.* 1 *Leon.* 95. *Knight* and *Footman.*

(*o*) See 7 *Durnf.* and *Eaſt.* 103. *Doe* d. *Harman & Ux.* v. *Morgan:* and ſee alſo 2 *Chanc. Rep.* 392. *Nayler* v. *Strode.*

(*p*) *Gilb. Ten.* 277. and ſee 1 *Hen. Blackſt.* 334. *Compton* v. *Collinſon.* And it ſhould ſeem, that by *ſpecial cuſtom*, ſuch ſurrender would be good, though the feme covert be an infant. See 1 *Hen. Blackſt.* 345.

(*q*) *Cro. Jac.* 526. *Smithſon* v. *Cage.*

(*r*) 1 *Leon.* 289. *Burgeſs* and *Foſter.* *Cro. Eliz.* 48. *Burdett's* caſe.

(*s*) *Cro. Eliz.* 717. *Eriſh & Rives.*

own,

own, it would be unreaſonable that the wife ſhould be ſuffered to deprive him of them by force of a particular cuſtom without his conſent: it has therefore been determined, that a cuſtom for a feme covert to ſurrender without ſuch conſent cannot be ſupported (*t*).

Not without aſſent of huſband.

But where a copyhold is ſettled on a wife for her own ſeparate uſe, it does not fall within the reaſons of the laſt caſe; and therefore, ſhe may ſurrender it without her huſband (*u*).

Separate eſtate.

And where the wife is *not* entitled to her ſeparate uſe, yet a ſurrender of her copyhold by her alone *with* the conſent of her huſband would be good (*w*).

And if the huſband be preſent at ſuch ſurrender it will be ſufficient proof of his aſſent (*x*). So, if the huſband and wife agree to live ſeparate, and the huſband thereupon covenants that the wife ſhall therefore enjoy to her own uſe her real eſtates, &c. after ſuch covenant her ſurrender ſhall be taken to be *with* his aſſent; and by cuſtom ſuch a ſurrender is good, as appears in *Moore*, 123. [*ca.* 268.] (*y*)

What ſhall be an aſſent of the huſband.

(*t*) 2 *Wilſ.* 1. *Stevens* d. *Wiſe* v. *Tyrrell.*

(*u*) See 2 *Bro. Chan. Caſ.* 377. *Compton* v. *Collinſon.* and 1 *Hen. Blackſt.* 341. 351. S. C.

(*w*) See 3 *Leon.* 81. *Skipwith's* caſe. 4 *Ibid.* 148. S. C. *Godb.* 14. 143. S. C. 2 *Brownl.* 218. *Moore.* 123. *Ca.* 268. See *Bro. Deviſe.* 34. *Co. Copyh. ſ.* 35. *Tr.* 79. 1 *Veſ.* 229. *Taylor* v. *Phillips. Ambler*, 628. *George* v.——. 2 *Brow. Ch. Ca.* 377. *Compton* v. *Collinſon*, and 1 *Hen. Blackſt.* S. C.

(*x*) 1 *Veſ.* 229. *Taylor* v. *Phillips.*

(*y*) 2 *Bro. Ch. Ca.* 377. and *387. *p. Buller, Commiſſioner*, and ſee 1 *Hen. Blackſt.* S. C.

If

If a feme ſole ſurrender to the uſe of her will, and afterwards marry; the marriage will be a revocation, or at leaſt a ſuſpenſion, of the ſurrender (*z*).

Marriage, a revocation of a ſurrender to a will by a feme ſole.

If a huſband ſurrender the copyhold of his wife, it will not be a diſcontinuance; a ſurrender only paſſing what he has a right to convey: it only binds during his own life; on his deceaſe, his widow or her heir may enter (*a*).

Surrender by huſband no diſcontinuance of wife's eſtate.

And it may be here obſerved that an huſband may ſurrender his own eſtate to the uſe of his wife (*b*); or the wife, where the cuſtom authorizes her to ſurrender, to that of her huſband (*c*): for the conveyance is through the intervention of the lord. But an huſband cannot without ſuch intervention convey to his wife, or the wife to the huſband, they being but one perſon in law; and therefore, the lord cannot grant a copyhold to his own wife (*d*).

Huſband may ſurrender to the uſe of his wife *& e contra.*

But the lord cannot grant to his own wife.

So, one joint tenant may ſurrender to the uſe of his companion (*e*).

A joint-tenant may ſurrender to his companion.

But when any one is authorized to ſurrender his copyhold, it is not always neceſſary that he ſhould do it in perſon: he may appoint, in many caſes, an attorney for the purpoſe.

Surrender by attorney.

Where the copyholder is not under any perſonal incapacity, as *non compos*, covert, or an infant, and poſſeſſes a power which may be delegated to another, a ſurrender which is warrant-

(*z*) *Ambler*, 627. *George* v. ——.
(*a*) 4 *Leon.* 88. *Ca.* 186. 4 *Co.* 23. *a.*
(*b*) 4 *Co.* 29. *b.* *Co. Copyh. ſ.* 35. *Gilb. Ten.* 220.
(*c*) See laſt page.
(*d*) 2 *Wilſ.* 254. *Firebraſs* d. *Symes* v. *Pennant.*
(*e*) *Ante p.* 61.

ed by the general law of copyholds may be by attorney, as well as in *propriâ perſonâ*.

Who cannot make attornies, with reſpect to the perſon.

In the firſt place then the perſon muſt not be under perſonal diſability, as before remarked; for a perſon *non compos*, under coverture, or an infant, cannot make an attorney by the common law, (*f*) nor can they be enabled by cuſtom.

Femes covert.

In ſome caſes, indeed, an attorney may be appointed by the huſband for himſelf and his wife; but that cannot be done in the preſent inſtance. The wife muſt, on her ſurrender, be ſeparately examined by the ſteward, to prevent the coercion of the huſband; this, therefore, would be fruſtrated by his appointment of an attorney: for a perſon cannot be examined by deputy.

But a feme covert &c. may be an attorny.

But a feme covert, or infant, may be an attorney for another; for they would act only as inſtruments and miniſterially (*g*).

Who cannot make attornies, with reſpect to the eſtate.

Secondly, The perſon who would make an attorney muſt have ſuch a power to aſſign as may be ſo executed; for *delegatus non poteſt delegare*.

And, therefore, where executors or other perſons are empowered to ſell the copyhold of their teſtator they cannot ſurrender by attorney; for, in fact, they are no more than attornies themſelves (*h*).

(*f*) The *ſtat.* 9 *Geo.* 1. only enables femes covert and infants to make attornies for the purpoſe of *admiſſion*. It has nothing to do with *ſurrenders*.

(*g*) See *Co. Litt.* 52. *a.*

(*h*) *Co. Copyh. f.* 34. 9 *Co.* 75. *b.*

Again,

A perſon cannot ſurrender by attorney, where he cannot ſurrender in perſon without a ſpecial cuſtom.

Again, a ſurrender which may be made by attorney muſt be ſuch as, if made by the copyholder himſelf, would be warranted by the general law of copyholds.

And therefore though he may ſurrender by attorney in court, or to the lord or ſteward, out of it.

Thus, a copyholder may ſurrender in court, (*i*) or into the hands of the lord (*k*) or the ſteward (*l*) out of court (*m*); without a ſpecial cuſtom to do ſo. He, therefore, may ſurrender in court (*n*), or to the lord (*o*) or ſteward (*p*) out of it, by attorney. For where he may ſurrender by the general cuſtom of the realm, which is the common law, it follows that he may do it by

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(*i*) 9 *Co.* 75. *b.* *Combes's* caſe.

(*k*) *Co. Litt.* 59. *a.* 1. *Salk.* 184. *Dudfield* v. *Andrews.*

(*l*) 1 *Salk.* 184. *Dudfield* v. *Andrews.* 1 *Lord Raym.* 76. *Tukely* v. *Hawkins.*

(*m*) In 2 *Veſ.* 680. in the caſe of *Mitchell* v. *Neale*, it is ſaid, that "a ſurrender by attorney cannot be out of court." But this, if underſtood generally, is contrary to unqueſtionable authority.

(*n*) 9 *Co.* 75. *b.*

(*o*) *Gilb. Ten.* 251. 2.

(*p*) It often happens that a caſe the moſt obvious and likely to occur has either not received an abſolute deciſion, or that deciſion has not been regularly reported; hence a direct reference is ſometimes impracticable. The preſent point, however, that a copyholder may ſurrender by attorney, into the hands of the ſteward, out of court, without a ſpecial cuſtom, may be proved ſyllogiſtically: Thus, in caſes where a copyholder may ſurrender by the general cuſtom of the realm, he may ſurrender by attorney. *Combes's* caſe, 9 *Co.* 75. *b.*

A copyholder may ſurrender by the general cuſtom to the ſteward out ofcourt. *Dudfield* v. *Andrews*, 1 *Salk.* 184. *Tukely* v. *Hawkins.* 1 *Lord Raym.* 76.

Therefore a copyholder may ſurrender by attorney, into the hands of the ſteward out of court by the general cuſtom of the realm.

attorney as a thing incident by the common law (*q*).

He cannot ſurrender to two tenants, or the bailiff, &c. without a further cuſtom to warrant it.

But where it is neceſſary to allege a ſpecial cuſtom to enable a copyholder to ſurrender in perſon, there he cannot ſurrender by attorney; as to ſurrender into the hands of two tenants (*r*) or into the hands of the bailiff or reeve of the manor (*s*): for in theſe caſes a ſpecial cuſtom would be neceſſary to warrant the ſurrender of the copyholder himſelf, and, therefore, a ſurrender by attorney would not be good without a further cuſtom for doing ſo.

Having thus ſeen who may appoint, and who may be appointed an attorney to ſurrender copyholds, we will now enquire how ſuch attorney may be appointed, and, when he is appointed, how he is to act.

How an attorney is to be appointed.

And, in the firſt place, it is ſaid that he muſt be appointed by deed (*t*): for when a ſtranger comes into court and declares himſelf authorized to ſurrender, and ſo to convey away the property of another perſon, it is certainly neceſſary that ſuch authority ſhould be ſatisfactorily proved by the ſolemn inſtrument of the abſent party.

The power may be in this form:

Form of the power.

"KNOW ALL MEN by theſe preſents, that I, *Timothy Walgrave* of *Clayton* in the county

(*q*) 9 *Co.* 75. *b.*

(*r*) *Co. Litt.* 59. *a.* 9 *Co.* 75. *b. Combes's* caſe. *Co. Copyh.* ſ. 34. *Gilb. Ten.* 252.

(*s*) *Co. Litt.* 59. *a.*

(*t*) *Gilb. Ten.* 252. *and Watk.* No. CXIII. *p.* 450. and ſee *Co. Litt.* 52. *a.*

of

of *Nottingham*, Eſquire, a cuſtomary or copyhold tenant of the manor of *Fairhurſt*, in the county of ——, have made, ordained, conſtituted, and appointed; and by theſe preſents, do make, &c. *Henry Pemberton* of *Fairhurſt* aforeſaid, gentleman, and *Edmond Akehurſt* of the ſame place, yeoman, (the bailiff or beadle of the manor of *Fairhurſt* aforeſaid,) my true and lawful attorney and attornies, jointly or ſeverally, for me the ſaid *Timothy Walgrave*, and in my name and ſtead, to ſurrender into the hands of the lord or lords of the ſaid manor of *Fairhurſt*, according to the cuſtom of the ſame manor, all that capital meſſuage, &c, and alſo all and ſingular other my copyhold or cuſtomary meſſuages, lands, tenements, and hereditaments whatſoever, lying or being within, and belonging to, or held of, the ſame manor, with their and every of their appurtenances; and all my eſtate and intereſt therein; *To the uſe of Walter Bridgman*, of, &c. his heirs and aſſigns for ever, according to the cuſtom of the ſame manor; and for me the ſaid *Timothy Walgrave*, and in my name, to do and execute all and every act and acts, thing and things, as ſhall be needful and requiſite for making ſuch ſurrender as aforeſaid, and for procuring him, the ſaid *Walter Bridgman*, his heirs and aſſigns, to be admitted to the ſaid copyhold premiſſes accordingly; as fully to all intents and purpoſes as if I the ſaid *Timothy Walgrave*, were perſonally preſent and did the ſame myſelf; hereby ratifying and confirming whatſoever my ſaid attorney or attornies ſhall law-

fully do, or cauſe to be done, in or about the premiſes. In witneſs whereof, I the ſaid *Timothy Walgrave* have hereunto ſet my hand and ſeal, this day of in the year of our lord one thouſand, *&c*".

How the attorney is to act.

When thus appointed, the attorney is to appear in perſon; for an attorney cannot make an attorney. He then ſhould exhibit his powers that the court or lord, *&c.* may be ſatisfied as to his authority. In making the ſurrender he muſt follow the uſual cuſtoms as to form, as if he was ſurrendering for himſelf (*k*). He muſt purſue the particular powers with which his principal has inveſted him; for he has no power of his own. If he be authorized to ſurrender black acre, he cannot ſurrender white acre; though they both belong to his principal and both be held of the manor. If he be commiſſioned to ſurrender to the uſe of *A.* he cannot ſurrender to the uſe of *B.* If to the uſe of *A.* for life, he will not be warranted in ſurrendering to the uſe of *A.* in fee (*l*).

He ought to act in the name of his principal; for though he may act in *his own* name, it is more proper and regular to do it in the name of the perſon appointing him (*m*). But he may act within his authority, although his principal be preſent (*n*).

(*k*) 9 *Co.* 76. *b.* 1 *Roll. Abr.* 501. *Copyh. H. pl.* (1).

(*l*) But if *A.* be admitted, it will be good for his life; for where an attorney exceeds his authority the exceſs only ſhall be void: and ſee *Co. Copyh. ſ.* 41. *Tr.* 93.

(*m*) See 1 *Salk.* 95-6. *Parker* v. *Kett.* 9 *Co.* 76-7.

(*n*) 2 *Veſ.* 679. *Mitchell* v. *Neale.*

When

When the attorney ſurrenders, let him ſay

Surrender by the attorney.

"I, *Edmond Akehurſt*, by virtue of the authority to me given by the power of attorney now read, and made by *Timothy Walgrave* Eſquire to me, do, for and in the name of the ſaid *Timothy Walgrave*, ſurrender and yield up into the hands of the lord of this manor of *Fairhurſt*, all, &c. *(following the deſcription in the power of attorney,)* to the uſe and behoof of *Walter Bridgman*, of, &c. his heirs and aſſigns for ever, by the delivery of this rod".

Or thus:

In the name of his principal.

"*Timothy Walgrave*, of &c. doth by me his attorney, lawfully appointed by the inſtrument now read, ſurrender and yield up into the hands of the lord of this manor of *Fairhurſt*, all &c. To the uſe of *Walter Bridgman* of &c. his heirs and aſſigns for ever, by the delivery of this rod."

Out of court into the hands of the lord.

If the ſurrender be to the lord out of court it may be thus taken:

Manor of Fairhurſt. BE IT REMEMBERED that on the Day of in the year of our lord one thouſand, &c. *Timothy Walgrave* of *Clayton*, in the county of *Nottingham*, eſquire, one of the copyhold or cuſtomary tenants of the manor of *Fairhurſt* aforeſaid, by *Henry Pemberton* his attorney duly appointed by a certain deed poll under the hand and ſeal of the ſaid *Timothy Walgrave*, bearing date, &c. did ſurrender into the proper hands of the lord of the ſaid manor by the rod, according to the cuſtom of the manor aforeſaid, and by the perſonal acceptance of the

ſaid lord, all, &c. *To the uſe* of *Walter Bridgman*, of &c. his heirs and aſſigns for ever, at the will of the lord according to the cuſtom of the ſaid manor.

Timothy Walgrave,
by
Henry Pemberton,
his attorney.

Taken the day and year first above written by me

A. B. lord of the ſaid manor.

—of the ſteward.

If the ſurrender be to the ſteward, ſay "by the acceptance of *Robert Atkins*, eſquire, chief ſteward of the ſaid manor, &c."

Entry on the rolls.

If the ſurrender be made in court enter it thus on the roll:

"ALSO AT THIS COURT came *Timothy Walgrave* of *Clayton*, in the county of *Nottingham*, eſquire, by *Edmond Akehurſt* his attorney, (duly conſtituted by a certain deed poll under the hand and ſeal of the ſaid *Timothy Walgrave*, bearing date, &c. which was produced and read in court,) and ſurrendered into the hands of the lord by the rod, and acceptance of the ſaid ſteward, all that capital meſſuage &c. and all his eſtate and intereſt therein, *to the uſe and behoof* of *Walter Bridgman* of, &c. his heirs and aſſigns for ever."

A perſon is not obliged to ſurrender by attorney.

But here we may obſerve that a perſon is not obliged to ſurrender by attorney; and, therefore, on a covenant to ſurrender on requeſt, the refuſing to execute a power to make a ſurrender is no breach (z).

(z) *Cro. Car.* 299. *Symms* v. Lady *Smith.*

So

So, a purchaſer is not obliged to accept a ſurrender by attorney, where the neceſſity is not apparent (*a*). nor the purchaſer to accept a ſurrender ſo made.

Fourthly, "A ſurrender is the yielding up of an eſtate by the tenant *to the lord*." The ſurrender is a relinquiſhment of the tenancy.

We have already noticed that the ſurrender is only the reſignation, or returning, or relinquiſhment of the copyhold to the lord, at whoſe will it was originally held; we will now, therefore, enquire into the powers and capacity of the lord to accept ſuch ſurrender.

And in the firſt place, we muſt obſerve that a ſurrender may be made either in or out of court, to the lord in perſon, to the ſteward, or his deputy; or by ſpecial cuſtom, to the bailiff, beadle or reeve, or to certain tenants of the manor. Where and to whom, it may be made.

Little need be obſerved on a ſurrender in open court: it is a matter of common right. The copyholder has power to ſurrender in court as incident to his tenure. No ſpecial cuſtom is neceſſary to be alleged for his doing ſo (*b*). Such ſurrender in the preſence of his fellow tenants is a matter of publicity; it, of conſequence, requires no preſentment to effectuate it, but is immediately enrolled: and it is ſimply entered thus: In open court.

AT THIS COURT came *I. S.* one of the copyhold or cuſtomary tenants of this manor, and ſurrendered into the hands of the lord, by the rod, and acceptance of his ſaid ſteward, accord- Entry of ſuch ſurrender on the roll.

(*a*) 2 *Veſ.* 679. *Mitchell* v. *Neale.*
(*b*) *Co. Lit.* 59. *a.*

ing

ing to the cuſtom of the ſaid manor, all, &c. (c).

Out of court.

We will therefore direct our more immediate attention to a ſurrender out of court; and proceed to enquire into the capacity of the perſon to whom a ſurrender may be made.

And, firſt, as to the perſon of the lord.

Who may be ſuch a lord as o take a ſurrender.

When the ſurrender is only to operate as a mean of conveyance to a third perſon, whoever is lord by right or by wrong (d), at the time, is capable of taking ſuch ſurrender; the lord, in ſuch caſe, being merely an inſtrument, the law regards not his title. Whether he be tenant in fee-ſimple, or only tenant for years, at will, or by ſufferance; whether he have an abſolute or defeaſible title, or not any title at all; as if he be an abator, intruder, or diſſeiſor; whether he have any intereſt or not in the manor, as if he be a guardian only, or have only an authority; whether he be an infant, or of full age, &c. (e), it matters not; for in all theſe inſtances he would only be the medium of transfer and act miniſterially.

(c) See *ante* p. 52.

(d) But lord, either by right or by wrong, he muſt be; and, therefore, if the freehold of a particular tenement held by copy be granted to a ſtranger, ſuch grantee cannot take a ſurrender; for he is not *dominus pro tempore*. Having no manor, he can, conſequently, be no lord. See 4 *Co.* 25. *a. Murrell* v. *Smith.* and ſee *Cro. Eliz.* 252. S. C. and *ante* c. 2. of Grants

(e) See 4 *Co.* 23. *b.* 24. *a. Co. Litt.* 58. *b. Co. Copyh.* ſ. 34. *Viner. Copyh.* (G.) (*I. b.* 3.) *Comyns's Dig. Copyh.* (C. 3.)

The

The ſurrenderee when admitted will not be in by the lord, but by him who ſurrendered to his uſe (*f*).

But if the ſurrender be to the lord's own uſe, or to be diſpoſed of as he ſhall pleaſe, a ſurrender to a tenant by wrong, as the diſſeiſor of a manor, ſhall not, it is ſaid, operate as an extinguiſhment (*g*). Surrender to a diſſeiſor to his own uſe.

Yet the doctrine, that a ſurrender to a diſſeiſor ſhall not operate as an extinguiſhment, ſeems queſtionable. A tenant by wrong, indeed, ought not to be ſuffered to prejudice him who has right; but it does not appear that if the ſurrender in this caſe was to be an extinguiſhment it would be attended with injury to any: as to the copyholder, it was his own folly to ſurrender; and if he ſuffers in conſequence of his own act he has nobody but himſelf to blame: and as to the rightful lord, he would be benefited and not injured by the *extinguiſhment* of the copyhold; for it would then go along with the manor, and be recovered as part of it on the manor being recovered (*h*). The *grant* of ſuch copyhold by the diſſeiſor, after the ſurrender, would, moſt certainly, not be good againſt the lord by right; for *the voluntary grants of* a diſſeiſor would not be valid: and that was the principal point in the caſe of *Moore* and *Pit*. As to the extinguiſhment, we find a great difference of opinion

(*f*) 4 *Co.* 28. *b.* and *poſt.*

(*g*) Sir *T. Jones*, 153. *Pit* v. *Moor.* 2 *Show. Rep.* 156. S. C.

(*h*) See *French*'s caſe, 4 *Co.* 31. *a.* and *b.*

in

in that caſe; and we are told in *Freeman* (*i*) that the court inclined to think that it *was* an extinguiſhment.

The lord may take a ſurrender out of court, or even out of the manor.

A copyholder may ſurrender into the hands of the lord as well out of court (*k*) as in, and even out of the manor, (*l*) without alleging a ſpecial cuſtom for ſo doing.

Steward.

Secondly, As to the ſteward.

As the ſteward, in taking ſurrenders, acts only miniſterially, the law is not very curious in examining the imperfections of his perſon, nor the lawfulneſs of his authority; for be he an infant, or *non compos mentis*, an idiot, or lunatick, an outlaw or an excommunicate, yet what things ſoever he performs as incident to his place can never be avoided for any ſuch diſability, becauſe he performs them as a judge, or at leaſt as cuſtom's inſtrument. And for his authority, though it prove but counterfeit if it come to exact trial, yet, if in appearance or outward ſhow it ſeems currant, that is ſufficient (*m*.)

As he acts, therefore, merely as an inſtrument in theſe caſes, no one can ſuffer from his want of a legal authority, ſince he only does that which he who has authority is compellable to do; and a tenant, when about to ſurrender, is not to inveſtigate the legitimacy of his powers. If he acts oſtenſibly as ſteward it is enough.

(*i*) 1 *Freem.* 245.
(*k*) *Co. Litt.* 59. *a.*
(*l*) 1 *Salk.* 184. *Duddfield* v. *Andrews.*
(*m*) *Co. Copyh. f.* 41. *Tr.* 104.

A ſteward,

A ſteward, as incident to his office, may take a ſurrender out of court (*n*), or even out of the manor (*o*); and may, as a conſequence, take the examination of a feme covert (*p*); though the ſurrender be to his own uſe (*q*): and this without any ſpecial cuſtom to warrant him, and though he be retained only by parol.

A ſteward may take a ſurrender out of the manor, &c.

So, the copyholder may ſurrender to him by attorney without alleging a cuſtom (*r*).

So he may take a ſurrender by attorney.

So, a ſurrender to a deputy ſteward is good (*s*). So, a deputy may appoint another perſon to take a ſurrender (*t*), though it be to be taken out of the kingdom (*u*): and it ſhould ſeem that the perſon ſo deputed may do any act which his principal might have done (*w*), and, by conſequence, take the examination of a feme covert (*x*)

Deputy ſteward.

Thirdly, As to the bailiff, beadle, or reeve.

Surrender to the bailiff, &c.

A copyholder may ſurrender out of court to the bailiff, beadle, or reeve of the manor, by virtue of a ſpecial cuſtom; but not without: and as a ſpecial cuſtom is thus neceſſary to warrant ſuch ſurrender, the copyholder cannot

(*n*) 1 *Salk.* 184. *Dudfield* v. *Andrews. Co. Litt.* 59. *a. n.* (6).

(*o*) 1 *Lord Raym.* 76. *Tukely* v. *Hawkins.*

(*p*) *Cro. Jac.* 526. *Smithſon* v. *Cage.*

(*q*) *Cro. Eliz.* 717. *Eriſh* v. *Rives.*

(*r*) See *ante p.* 67.

(*s*) 1 *Comyns's Rep.* 84. *Parker* v. *Keck.* 1 *Lord Raym.* 658. S. C. 1 *Salk.* 95. S. C. See *Moore* 112. *Ca.* 252.

(*t*) See *Parker* and *Keck*, as before.

(*u*) 4 *Leon.* 111. *Heggor* and *Felſton.*

(*w*) See 1 *Lord Raym.* 659.

(*x*) 1 *Leon.* 289. *Burgeſſe* and *Foſter. Cro. Eliz.* 48. *Burdet's* caſe, and ſee *Cro. Jac.* 526. *Smithſon* and *Cage.*

without

without the like ſpecial cuſtom ſurrender to them by attorney (*y*).

To tenants out of court.

And, *laſtly*, a copyholder may ſurrender out of court, by ſpecial cuſtom, to certain tenants of the manor; as into the hands of two tenants (*z*); or of one tenant (*a*); or to one tenant in the preſence of other perſons (*b*).

And the heir of a copyholder is a ſufficient tenant for the purpoſe of taking ſuch ſurrender before his admittance (*c*).

But a copyholder, after attainder for felony, cannot take ſuch ſurrender; though he be pardoned; for, on attainder, he ceaſed to be a tenant (*d*).

As a ſpecial cuſtom is requiſite to warrant a ſurrender to tenants out of court, ſo a copyholder cannot ſurrender to them, when ſo warranted, by attorney, without a further cuſtom to enable him to do ſo (*e*).

So, ſuch tenants who are authorized to take a ſurrender cannot take the examination of a feme covert without a ſpecial cuſtom empowering them ſo to do (*f*).

If a copyholder covenant to ſurrender his copyhold, and afterwards ſurrender it to two te-

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(*y*) *Co. Litt.* 59. *a.*

(*z*) *Co. Litt.* 59. *a. Co. Copyh. ſ.* 34. *Tr.* 79. 6 *Co.* 76. *a.* and *b.*

(*a*) *Kitch.* 102. *b.* 1 *Roll. Rep.* 125.

(*b*) *Kitch.* 102. *b.*

(*c*) 1 *Keb.* 25. *Muniface* and *Baker*, *p. Twiſden.*

(*d*) Sir *T. Jones*, 190. *Beniſon* and *Strode.*

(*e*) *Ante p.* 68.

(*f*) *Cro. Eliz.* 717. *Eriſh* and *Rives.*

nants

nants out of court, according to the cuſtom; it will be a good performance (*g*).

But if a tenant refuſe to take a ſurrender out of court, where the cuſtom is that he may take ſuch ſurrender, yet no action lies againſt him (*h*).

When a ſurrender is made out of court into the hands of any who cannot thereupon make an admittance, or if no admittance be immediately made by a perſon enabled to admit, ſuch ſurrender ſhould be regularly preſented. Preſentment.

From the general terms in which the neceſſity of a preſentment of a ſurrender made out of court is aſſerted in many of our books, it ſeems to have been too often inferred that ſuch preſentment is equally requiſite into whoſe hands ſoever the ſurrender is made. When requiſite.

It is ſaid in *Calthorpe*, that if the lord, having copyhold lands ſurrendered into his hands, will, in the preſence of his tenants out of court, grant the ſame to another; and the ſteward enter the ſame into the court book, and make thereof a copy to the grantee; and the lord die before the next court; it will be no good copy to hold the land (*i*). No preſentment required when the ſurrender is made to the lord, and admiſſion be immediately made.

But it muſt be evident from the reaſon of the thing, as well from the weightier teſtimony of other writers, that the preſentment is only for

(*g*) 3 *Salk.* 100. *Page* v. *Smith.* 1 *Levinz.* 293. *Beany* v. *Turner.* 2 *Keb.* 660. *Turner* v. *Benſon.*
(*h*) 1 *Roll. Rep.* 126. in the caſe of *Ford* and *Hoſkins.*
(*i*) *Calth.* 46.

the

the information of the lord, to apprize him that ſuch ſurrender has been made (*k*).

To what purpoſe can it be to make known to the lord that ſuch ſurrender was made, when the lord knows it already. Why declare to him that it was taken, when he muſt be conſcious that he had taken it himſelf? Beſides, who is to preſent a ſurrender taken by the lord? The lord may take a ſurrender without the preſence of a tenant. Is the lord to preſent it himſelf? But to whom is he to preſent it? Whom is he to inform of the event? He cannot preſent it to himſelf; and he is not obliged to ſay any thing about the matter to his tenants. When the lord, therefore, takes a ſurrender out of court he may admit without any preſentment (*l*).

So as to the ſteward.

The ſame reaſoning holds equally good as to the ſteward in caſes where the ſurrender is only the mean of conveyance. He may accept ſuch ſurrender and immediately admit the *ceſtuy que uſe* (*m*). It is clear that many of the books, when ſpeaking of the neceſſity of a preſentment in caſe of a ſurrender being made *to the lord* out of court, mean only a ſurrender made out of

(*k*) *Gilb. Ten.* 278.

(*l*) 1 *Roll. Abr. Copyh.* (M) *pl.* 4. *p.* 502. *Froſwell* v. *Welch.* and ſee the S. C. at large. 1 *Roll. Rep.* 514. and 3 *Bulſtr.* 214. *Godb.* 268. and ſee alſo *Watk. Gilb.* 278-9. and No. CXI. *p.* 447. 9.

(*m*) See *Froſwell* and *Welch*, as before, and *Watk.* No. CXI. and CXII. to *Gilb. Ten.*

court

court to the lord *by the hands of tenants, or of thoſe of the bailiff or reeve* (*n*).

But if the ſurrender be taken out of court by the lord or the ſteward, perſonally, and no immediate admiſſion be made, the memorandum of the taking of ſuch ſurrender, ſigned by the tenant who ſurrenders and the lord or the ſteward taking it (*o*), ſhould be certified and produced, on admittance being requeſted at a future time, from the lord if the ſteward had taken it, or from the ſteward if taken by the lord.

But if the ſurrender be made *out of court*, and the admiſſion *in*, it ſhould be ſo certified.

If admittance be immediately made by the lord or ſteward taking ſuch ſurrender, yet ſuch admittance ſhould be regularly notified at the next court-day for the information of the tenants. This too was more immediately neceſſary in ancient days, as, in caſe the tenants ſhould have known any objections to the perſon ſo admitted, of which the lord might have been ignorant, they might have informed him of them; from which he might have been induced to reſume the eſtate, as having conferred it on a perſon who was unworthy of the grant. Add to this, that it muſt be regularly inſerted on the court-rolls of the manor, by a copy of which he is to hold (*p*).

And if the admittance be out of court alſo by the perſon taking the ſurrender, yet it ſhould be certified at the next court day.

If the ſurrender be made into the hands of tenants, or into thoſe of the reeve or bailiff, or, in ſhort, of any other perſon than the lord or ſteward, the ſurrender muſt be preſented in

But if the ſurrender be made to any other perſon than the lord or ſteward, a preſentment will be neceſſary.

(*n*) See *Co. Litt.* 62. *a.* *Co. Copyh. ſ.* 40.
(*o*) *Ante.*
(*p*) *Watk. Gilb. Ten.* 449. CXI.

court, in order to inform the lord or the ſteward that ſuch ſurrender was taken (*q*). And the preſentment is thus made: the perſon who took the ſurrender comes into court and produces the memorandum, if any; if there be none he certifies to the court that the ſurrender was duly made into his hands, and then the homage preſent it: and the preſentment is thus entered:

Entry of preſentment on the rolls.

"AND the homage aforeſaid alſo find and preſent that *A. B.*, one of the copyhold or cuſtomary tenants of this manor, who held to him and his heirs, at the will of the lord, according to the cuſtom of the manor aforeſaid, *All* that cuſtomary or copyhold meſſuage, *&c.* DID, out of court and ſince the laſt court, ſurrender into the hands of the lord, by the rod, and acceptance of *C. D.* the bailiff of this manor, (or *E. F.* one of the cuſtomary tenants of this manor; *as the caſe may be*) according to the cuſtom of this manor, *All* that his ſaid cuſtomary or copyhold meſſuage, *&c. To the uſe of, &c.*"

Or thus:

"ALSO AT THIS COURT came *A. B.* and *C. D.* two of the copyhold or cuſtomary tenants of this manor, in their proper perſons, and certified in open court, and thereupon the homage preſent, that, out of court, and ſince the laſt court, *E. F.* who held to him and his heirs at the will of the lord, according to the cuſtom of this manor, *All, &c. Did* ſurrender into the hands of the lord, by the rod, and acceptance

(*q*) *Co. Litt.* 59. *a.* &c.

ceptance of the ſaid *A. B.* and *C. D.* according to the cuſtom of this manor, *All* that his ſaid copyhold or cuſtomary meſſuage, *&c. To the uſe of*, &c,"

By whom to be certified.

Such ſurrender, ſo taken out of court, ſhould be regularly certified by thoſe who took it. But this, though frequently affirmed in the books to be indiſpenſible, is now acknowledged not to be of neceſſity. If the tenants or bailiff who took ſuch ſurrender die, yet, it may be preſented on good proof (*r*). And if they are living and do not certify the taking, yet, if it be ſatisfactorily proved to the court that ſuch ſurrender was made, it is ſufficient (*s*). Were it to depend wholly on the perſonal teſtimony of the individuals who took it, the time allowed by the cuſtom for preſentment might elapſe before they choſe to certify (*t*). Beſides, the only end of ſuch teſtimony is to inform the lord or ſteward that the ſurrender was duly taken; and if this be accompliſhed it is enough. If the lord or ſteward be ſatisfied that ſuch ſurrender was abſolutely made they may notice it without a preſentment; and their admittance of the ſur-

(*r*) *Gilb. Ten.* 220. *Cro. Jac.* 403. *Froſel* v. *Welch. Co. Copyh. ſ.* 40.

(*s*) *Gilb. Ten.* 280. *Lex. Cuſt.* 240. *ch.* 16. And ſee *Cro. Jac.* 403. *Froſel* v. *Welſh.* But it is ſaid in 3 *Bulſt.* 218. that a ſpecial cuſtom may confine ſuch notification to the individuals who took the ſurrender.

(*t*) In caſe of refuſal we are told by *Lord Coke*, that on petition or bill exhibited in the lord's court, the party grieved ſhall there find remedy. *Copyh. ſ.* 40. *p.* 89.

renderee will be good (*u*). The end of preſentment is anſwered; and therefore it would be nugatory to preſent.

But here we may remark the utility of making a memorandum of the taking ſuch ſurrender out of court, and of it's being regularly ſigned by the ſurrenderor and the perſon or perſons into whoſe hands it is made (*w*); that, in caſe of death, or refuſal, or negligence of the perſons taking it, the ſurrender may be the more eaſily proved.

When to be made.

The preſentment of a ſurrender ſhould, by the general cuſtom of manors, be at the next court; though, by ſpecial cuſtom, it may be at a ſubſequent one (*x*).

And the preſentment of a ſurrender to the uſe of a will may, by ſpecial cuſtom, be made at the next court after the death of the ſurrenderor, though it be not the next after the ſurrender made: and it ſhould ſeem alſo that it would be good without ſuch ſpecial cuſtom (*y*).

(*u*) *Gilb.* 278-9. 3 *Bulſt.* 217. 219. *Roſewell* v. *Welſh.* But this is while ſuch ſurrender continues in force: for, if the ſurrender become void for want of a timely preſentment, a ſubſequent admiſſion will not give it effect. The lord cannot notice a ſurrender which has ceaſed to exiſt. The ſurrender, in ſuch caſe, would be utterly at an end, and conſequently there could ben one on which to found ſuch admiſſion.

(*w*) See *Ante.*

(*x*) *Co. Copyh. ſ.* 40. *Tr.* 88. See 2 *Veſ.* 302. 602. 680.

(*y*) See *Com. Dig. Copyh.* (F. 9. & 10.)

If

If the ſurrender be not certified within the time preſcribed by the cuſtom, the homage, it ſhould ſeem, would be juſtified in refuſing to preſent it (*z*). For ſuch cuſtom, being in itſelf ſo ſalutary and reaſonable (*a*), ought to be ſtrictly obſerved: and it does not appear that it can be in the power of the homage to reſcind or diſpenſe with it. When the preſcribed time is elapſed, the ſurrender would, it ſhould ſeem, become abſolutely void at law (*b*).

Want of preſentment aided in equity.

Equity will, however, under certain circumſtances, aid againſt the want of a timely preſentment (*c*).

Preſentment to be made though the ſurrenderor, &c. die.

Again, ſuch preſentment of a ſurrender out of court may be made though the ſurrenderor, or the ſurrenderee, or both of them, happen to die before ſuch preſentment be made (*d*).

The ſurrender does not derive its obligatory power from the preſentment.

Much is to be found in the books of the obligatory power of the preſentment with reſpect to

(*z*) See 2 *Vern.* 564. *Taylor* v. *Wheeler.*

(*a*) See *Gilb. Ten.* 280.

(*b*) *Co. Litt.* 62. *a.* See 2 *Salk.* 449. *Taylor* v. *Wheeler.* 2 *Vern.* 564. S. C. 2 *Vern.* 609. *Jennings* v. *Moore*, & *al.* If the cuſtom limit a certain time, as twelve months, it is ſaid that the preſentment would not be good if made afterwards, *though no court was held during the twelve months*; for the ſurrenderor ſhould have procured a court. See *Cro. Jac.* 403. But the ſurrenderor ſhall in ſuch caſe be compelled to ſurrender again. See 2 *Vern.* 564. *Taylor* v. *Wheeler*, and *poſt. p.* 88.

(*c*) Caſes of *Taylor* v. *Wheeler*, *in Vern.* and *Salk. Jennings* v. *Moore*, & *al.* &c.

(*d*) 4 *Co.* 29. *b.* 5 *Bur.* 2764. *Vaughan* d. *Atkins* v. *Atkins.*

ſurrenders out of court. The ſurrenderor is not, it is repeatedly affirmed, concluded till the ſurrender be preſented. Before actual preſentment, ſay they, he may ſurrender to another perſon; and if the ſecond ſurrender be preſented and admittance enſue, it ſhall totally annul the former (*e*).

That the eſtate continues in the ſurrenderor till preſentment is clear: and it is equally clear that it continues in him till admiſſion (*f*). And it is clear alſo that the enſuing admiſſion ſhall relate to the ſurrender and defeat the meſne acts of the ſurrenderor (*g*).

But the truth ſeems to be that ſo ſoon as the copyholder ſurrenders, though out of court, for a valuable conſideration (*h*), ſo ſoon is the ſurrenderor concluded at law (*i*), as well as in

(*e*) See the caſe of *Burgoine* and *Spurling*, *Cro. Car.* 283. *Sir W. Jones* 306. *&c. Gilb. Ten.* 281.

(*f*) *Poſt.*

(*g*) *Benſon* and *Scott*, *Carth.* 275. *&c. Vaughan* d. *Atkins* v. *Atkins*. 5 *Burr.* 2764. And *poſt.*

(*h*) See *Kitch.* 82. *a. Co. Copyh. ſ.* 39. *Tr.* 87. 8.

(*i*) See *Kitch.* and *Cz. ubi ſup.* 2 *Blackſt. Comm. c.* 22. *p.* 368, 369. and 4 *Burr.* 1961. *Lord Mansfield*, in the caſe of *Vaughan* d. *Atkins* v. *Atkins*, ſaid the "ſurrender is a *complete* execution of the contract, as between the *vendor* and *vendee*." 5 *Burr.* 2785. And in that of *Roe* d. *Noden* v. *Griffiths*, he repeatedly declared that "the land was bound by the ſurrender." 4 *Burr.* 1961. So alſo in that of *Vaughan* d. *Atkins* v. *Atkins*. 5 *Burr.* 2787. See alſo *Salk.* 185. *Benſon* and *Scott*; and 1 *Durnf.* and *Eaſt*, 601. *Holdfaſt* d. *Wollams* v. *Clapham.*

equity

equity (*k*); and his hands for ever bound up from diſpoſing of the land in any other way, and his mouth for ever ſtopped from revoking or countermanding his own deliberate act (*l*).

Revocation of a ſurrender.

If, indeed the ſurrender be merely *voluntary* the ſurrenderor may revoke it, not only at any time before preſentment, but, according to *Kitchen*, ("a book," ſaid C. J. *Willes*, "of good authority; and the rather becauſe founded on old determinations not advancing fancies of their own (*m*),") at any time before admiſſion: "and this," ſaid he, "is moſt commonly done, and that with reaſon; and ſuch appears to me to be the law (*n*)."

It is not, therefore, in either caſe, the preſentment that concludes the ſurrenderor. In the caſe of a ſurrender for a valuable conſideration, he cannot revoke it, or poſſibly delude or defraud the ſurrenderee of the effects of his ſurrender or the fruits of his grant (*o*).

And where the ſurrender is *merely voluntary*, he may revoke *after preſentment* as well as before (*p*).

Surrender becoming void on non-preſentment within time.

If indeed the cuſtom require that ſuch ſurrender ſhould be preſented within a limited time, and declare that it ſhall be void if not preſented within ſuch time, if it be not preſented within

(*k*) See *Taylor* and *Wheeler*, 2 *Salk.* 449. and 2 *Vern.* 564. *Jennings* v. *Moore*, & *al.* 2 *Vern.* 609.
(*l*) *Co. Copyh. ſ.* 39. *Tr. p.* 88. 2 *Bl. Comm.* 369.
(*m*) 2 *Veſ.* 609.
(*n*) *Kitch.* 82. *a.*
(*o*) *Co. Copyh. ſ.* 39. *Tr. p.* 88.
(*p*) *Kitch.* 82. *a.* as before.

such time, it must, of consequence, be annulled: but this does not prove that it was revocable *before* it was rendered void. If it become void by reason of a want of a timely surrender, the surrenderor will be compellable to surrender anew (*q*).

the vendor must make a new surrender.

The presentment must accord with the surrendor.

Great care, however, should be taken that the presentment be duly made within the time which the custom has prescribed, and that the presentment, when made, exactly "ensue" or correspond with the surrender.

And, on this latter point, the observations and reasoning of the late lord chief baron *Gilbert* are so just and forcible that I shall give his own words.

"My Lord *Coke* says, (*r*), that presentments of surrenders ought, in all material points, to ensue and agree with the surrenders themselves, else the surrender, presentment, and admittance thereupon will be void, which seems reasonable; for if the presentment in matter differs from the surrender, the lord has no sufficient notice of the surrender, and then the admittance of it in reason must be bad, and not help out the presentment; for if the lord knew the true surrender, perhaps he would never consent to such a surrender; and the true surrender ought to be known, that the lord may know his tenant, and from whom to take his services. The admittance cannot help out, for that was grounded

(*q*) See 2 *Vern.* 564. *Taylor* v. *Wheeler*; and *ante*; *p.* 85.
(*r*) *Co. Copyh. f.* 40. *Tr. p.* 88. 4 *Co.* 25. *a.* 2 *Bl. Comm.* 369. *ch.* 22.

upon

upon the preſentment; but if the lord had notice of the true ſurrender, though the preſentment did differ, yet it ſeems reaſonable the admittance ſhould enure according to the ſurrender, becauſe he had notice of the true ſurrender, and when a man is admitted, he is in by the ſurrender.

Where it is ſaid that, if the preſentment differ in points material from the ſurrender, that there the admittance, preſentment, and ſurrender, are all void; it ſeems this muſt be underſtood, if the time for preſenting the ſurrender be paſt; for if there ſhould be a preſentment and admittance made contrary to the ſurrender, ſure this will not make the ſurrender void before the utmoſt time allowed by law for the ſurrender's being preſented; for it is no reaſon to ſay that becauſe the preſentment is void, that therefore the ſurrender is void; for the ſurrender depends not on the preſentment, though it may be void becauſe not preſented, but not becauſe ill preſented. So that if after ſuch ill preſentment and admittance, there ſhould be a good preſentment and admittance, it ſeems the ſurrender and all other acts will ſtand good (*s*)."

An erroneous entry on the roll may be amended.

If the preſentment be truly made, and accord with the ſurrender, and yet be wrongly entered upon the rolls, the rolls ſhall be amended.

As if a ſurrender be made upon condition, and ſo preſented, and the ſteward, in entering it,

(*s*) *Gilb. Ten.* 336.

omit

omit the condition, enrolling it as an abſolute one, yet, upon ſufficient proof made in court, the ſurrender ſhall not be avoided, but the roll, being no eſtoppel nor record, ſhall be amended, and this ſhall be no concluſion to the party, to plead or give in evidence the truth of the matter (*t*). And though the admiſſion was abſolute, yet the ſurrenderee ſhall be ſubject to the condition: for when admitted, he ſhall be in by the ſurrenderor, and the lord cannot vary his eſtate (*u*).

Fifthly; "A ſurrender is the yielding up of an eſtate by the tenant to the lord, either as *a relinquiſhment or reſignation of ſuch eſtate*, or as the mean of conveying or transferring it to another."

Surrender conſidered as a relinquiſhment of the eſtate.

And here we ſhall conſider ſuch ſurrender *as a relinquiſhment or reſignation of the copyholder's eſtate.*

Under the ancient law there were villeins who could not relinquiſh.

Long after the *Norman* conqueſt there were many villeins or bondmen in ſo abject a ſlavery as to hold the portions allotted them of the de-

(*t*) *Co. Copyh. ſ.* 40. *p.* 89. *Gilb. Ten.* 192. 254. *Dyer* 251. *b.* *Winter* and *Feringham.* In the caſe of *Winter* and *Feringham*, the enrollment embraced more copyhold property of the tenant than the ſurrender, and the queſtion was whether more ſhould paſs? And we are told that "it was in debate for the ſpace of 24 years in ſeveral courts; and, by the opinion of *Dyer*, no more than was particularly expreſſed in the ſurrender ſhould paſs. And accordingly *a decree was made by Lord Wentworth, Lord and Chancellor of his manor of Hackney; whereof he afterwards repented:* yet many others agreed with the above opinion as law."

(*u*) *See* 4 *Co.* 28. *b.* and 3 *Burr.* 1543: and 4 *Ibid.* 1961.

meſnes

meſnes of the manor abſolutely at the will of the lord; being neither permitted to hold them againſt the lord's inclination, nor to quit them without his permiſſion. So far from acquiring property themſelves, they themſelves were the property of their lord. Inſtead of the lands belonging to them, they were regarded as annexed to the lands. On a grant of the manor they paſſed as appendages; and were not conſidered as having a will of their own.

There were others who, though they held at the will of the lord, might have quitted or renounced the tenancy when they thought proper to do ſo.

There were others who might have done ſo.

Again, a third claſs exiſted who could neither be amoved or expulſed from their lands, while they performed the ſervices impoſed, nor compelled to hold them againſt their inclinations (*w*).

A third claſs were irremovable while they performed their ſervices.

Without tracing, however, the changes which the villein tenure experienced, or the melioration of the ſtate of the peaſantry, we may remark that it has been long eſtabliſhed that the copyholder cannot be deprived of his lands, (though he is ſtill ſaid to hold at the will of the lord) but by his own act or miſconduct (*x*). If he neglect or refuſe the returns which he is bound by his tenancy to render; if he do any act incompatible with the nature of his te-

So a copyholder cannot be expulſed but by reaſon of his own act:

(*w*) See 1 *Bl. Law Tr.* 119. *&c.* and the authorities there referred to; and *Watk.* No. CXLI. to *Gilb. Ten. p.* 462.

(*x*) See *ante ch.* 2. Of Grants.

nure,

nure, or injurious to the eſtate which he holds, a forfeiture will be juſtly incurred. But while he duly performs his ſervices and acts conſiſtently with his relations to the lord, he has a right to retain his lands till he chooſe to relinquiſh the tenancy.

but he may relinquiſh his eſtate.

If he is deſirous of returning the lands to the lord, he may ſurrender up the poſſeſſion to him by the accuſtomed ſymbol and in the uſual form; as he would have ſurrendered it to the uſe of any other perſon; declaring expreſsly his intention that it ſhall be to the uſe or benefit of the lord, or, in the language of earlier days, "that the lord may do therewith his will" (y).

Expreſs relinquiſhment.

No uſe expreſſed.

Though no uſe be expreſſed, yet if it be merely ſurrendered into the lord's hands, and there be no peculiar circumſtance in ſuch ſurrender to rebut the preſumption, it will be a ſufficient relinquiſhment; and ſhall be to the benefit of the lord: as the ſurrender in itſelf is no more than the returning the poſſeſſion of, and right to, the tenements to the lord of whom they are held. And if there be nothing to induce a different conſtruction, if there be no apparent end which ſuch different conſtruction can anſwer, the ſurrender muſt have its natural effect (z).

(y) Of a ſurrender to the *diſſeiſor* of a manor, ſee *ante*.

(z) See 1 *Lord Raym.* 627. *Fiſher* and *Wigg. p. Holt C. J.* 1 *P. W.* 17. S. C. *Watk.* No. CXVII. to *Gilb. Ten.* 457.

There

There are many modes by which the tenancy may be relinquiſhed, but they will more properly fall under our conſideration when we come to treat of the extinguiſhment of copyhold property (*a*). Relinquiſhment.

When a copyhold is thus returned to the lord it ſtill retains its demiſable qualities; but, till granted again by copy, it ſhall follow the manor into whoſe hands ſoever it paſs (*b*). But the lands may be again granted by copy.

In the next place, we ſhall conſider ſuch ſurrender as the *mean of conveying or transferring a copyhold to another*. Surrender conſidered as the mean of conveyance.

We have already ſeen the *neceſſity* of a ſurrender as ſuch mean of conveyance and the principles on which it depends (*c*).

We have ſeen too that, though the copyholder held originally merely at the will of the lord, the law has ſo eſtabliſhed his intereſt that he cannot be diſpoſſeſſed of his tenements while he renders his ſervices and obſerves the cuſtoms of the manor (*d*). As the law has thus eſtabliſhed his intereſt, it has alſo enabled him to transfer it to another on purſuing the accuſtomed forms. The copyholder has now in moſt caſes a right to nominate a perſon to ſucceed him in his tenancy; whom (if ſuch perſon has no legal incapacity to take) the lord is compellable to accept as his tenant (*e*). Right of the copyholder to transfer his intereſt.

(*a*) *Poſt. ch.* 9.
(*b*) *Poſt. ch.* 9.
(*c*) *Ante.*
(*d*) *Ante ch.* 2. Of G ants.
(*e*) *Ante* and *poſt. ch.* 6. Of Admiſſion.

The

Surrender a form.

The ſurrender, therefore, in theſe caſes is only a form; it is merely the medium of conveyance: for even where it is ſtrictly obſerved, it is now purely ſubſervient to the conveniency of the tenant as a mode of transferring his intereſt.

On ſurrender no eſtate paſſes to the lord.

On ſuch ſurrender being made, no eſtate paſſes, in conſequence, to the lord (*f*), but it remains, till the nominee be admitted, in the ſurrenderor. *He* continues tenant; and muſt anſwer the ſervices and returns (*g*). 'Till ſuch admiſſion of the ſurrenderee, the ſurrenderor may maintain an action of treſpaſs (*h*); and, if he die, the premiſes will deſcend to his heir (*i*).

Surrenderor remains tenant till admiſſion of ſurrenderee;

and may ſurrender to another without a formal revocation.

If he ſurrender to the uſe of any one without conſideration, he may again ſurrender to another without a formal revocation of the firſt ſurrender (*k*). So, if he ſurrender to the uſe of his will, and afterwards, without taking any notice of ſuch ſurrender, he ſurrender to another in fee, the ſecond ſurrender will be good (*l*).

No more paſſes than to anſwer the intent of the ſurrenderor.

So, as a ſurrender is merely to effectuate the copyholder's alienation, no more ſhall paſs by it than it was his intention to paſs: if the copyholder, therefore, ſurrender to the uſe of *A.* for life, or in tail; or to the uſe of his laſt will; and

(*f*) *Cro. Car.* 283. *Burgoin* and *Spurling.*
(*g*) *Co. Copyh. ſ.* 39.
(*h*) *Cro. Eliz.* 349. *Berry* and *Greene.*
(*i*) *Cro. Jac.* 403. *Froſel* v. *Welſh.*
(*k*) See *ante Cro. Car.* 283. *Burgoin* and *Spurling.*
(*l*) *Cro. Eliz.* 442. *Fitch* and *Hockley.* and ſee 2 *Juſt. Blackſt. Rep.* 1046. *Thruſtout* d. *Gower* v. *Cunningham.*

he

he die without making a will; or, if making a will, he limit only a portion of the eſtate; the reſidue, or part undiſpoſed of, in the firſt and laſt caſes, and the whole in the ſecond, will be the old eſtate and deſcend to his cuſtomary heirs (*m*).

The reſidue continues in him.

So if he ſurrender to particular uſes with the ultimate limitation expreſsly to his own right heirs, they ſhall take ſuch limitation as the old eſtate, and, conſequently, by deſcent (*n*).

If he limit to his own heirs they ſhall be in of the old eſtate.

A difference, indeed, has been taken, as to this latter point, when the ſurrenderor takes a particular eſtate himſelf, and when not. As, if a ſurrender be made to the uſe of the ſurrenderor for life, with remainder to a ſtranger in tail, and the ultimate limitation be to the heirs of the ſurrenderor, his heirs ſhall take by *deſcent:* yet if the ſurrenderor take *no particular eſtate himſelf*, and the ultimate limitation *then* be to his own heirs, ſuch heirs, it is ſaid, ſhall be in *by purchaſe* (*o*).

Diſtinction in *Allen & Palmer* controverted.

But although this diſtinction is recognized in the caſe of *Roe* v. *Quartley* (by *Aſhhurſt* J. when delivering the opinion of the court (*p*); yet ſuch diſtinction has been queſtioned by

(*m*) 9 *Co.* 107. *a.* 1 *Brownl.* 181. *Cro. Eliz.* 148. *Bullen* and *Grant. Ibid.* 442. *Fitch* v. *Hockley.* 4 *Co* 29. *b.*

(*n*) 4 *Burr.* 1952. 1960. *Roe* d. *Noden* v. *Griffiths.*

(*o*) See the caſe of *Allen* and *Palmer*, 1 *Leon.* 101: and *Kitch.* 86. *a.* 88. *a.* and *b.* *Lex Cuſt.* 125. *ch.* 15.

(*p*) 1 *Durnf.* and *Eaſt*, 634.

C. B. *Gil-*

C. B. *Gilbert* (*q*); and, after him by Mr. *Fearne* (*r*).

Had the ultimate limitation been expreſsly made *to the ſurrenderor and his heirs*, whether he himſelf had, or had not, taken a particular eſtate, his heirs would neceſſarily have been in *by deſcent:* But whether ſuch ſurrenderor would have taken ſuch ultimate eſtate (without taking a particular one) as a *remainder*, or as *his reverſion*, ſeems to have been diſputed. According to the diſtinction above noticed, and eſpecially the caſe cited in *Kitchin*, the ſurrenderor would have taken it *as a remainder:* but according to later deciſions, and particularly the caſe of *Roe* d. *Noden* v. *Griffiths* (*s*), he would have been in of his *old eſtate*.

And it has, indeed, been, I believe, uniformly held that, if a copyholder in fee ſurrender his eſtate to the uſe of his will, and deviſe to a ſtranger for life, or in tail, and ſo leave a portion of the fee unlimited, (*without* giving it expreſsly to his heirs) it ſhall be conſidered as his reverſion, or undiſpoſed of reſidue, and go to his heirs by deſcent (*t*). So, where a copyholder, ſeized in fee, ſurrendered to the uſe of his will and afterwards *ſurrendered* to parti-

(*q*) *Ten.* 272-3.

(*r*) *Conting. Rem.* 48. *3d Ed.* 86. *4th. Ed.*

(*s*) 4 *Burr.* 1952. and ſee *Thruſtout* d. *Gower* v. *Cunningham. Fearne*, 90. (*4th. Ed.*) and 2 *Juſt. Blackſt. Rep.* 1046.

(*t*) 1 *Leon.* 174. *Bulleyn* and *Grant. Cro. Eliz.* 148. S. C. 4 *Co.* 29. *b. Bunting* and *Lepingwell.*

cular

cular uſes with the ultimate limitation to his own right heirs; it was adjudged that he was in of his *old eſtate*, and that he might have deviſed his reverſion without any freſh ſurrender or admiſſion (*u*).

Now the idea that when the ultimate limitation was *expreſsly* made to the heirs of the ſurrenderor, the heirs ſhould take by *purchaſe*, and when it was *not* expreſsly made to them, but reſulted or aroſe by implication, they ſhould take by *deſcent*, originated in this; that the eſtate being yielded to the lord, the uſes limited were *new* uſes; and as the *whole eſtate* was thus limited, nothing remained in the ſurrenderor. But when the whole was *not* ſo limited, the reſidue, as *undiſpoſed* of, reſulted to him again. And a diſtinction ſimilar to this was once held as to freeholds (*w*). But as ſuch diſtinction, with reſpect to freeholds, has been now long exploded; it having been repeatedly declared that it matters not whether the ultimate limitation to the heirs of the grantor be expreſsly made or reſult by implication of law (*x*); and as the doctrine once entertained that by a ſurrender of a copyhold the *old* eſtate of the ſurrenderor was deſtroyed and the uſes limited to

(*u*) *Thruſtout* d. *Gower* v. *Cunningham*. 1 *Fearne* 90. and 2 *Juſt. Blackſt. Rep.* 1046.

(*w*) *Dyer*. 134. *a. pl.* 7. *&c.* and *Hob.* 31.

(*x*) 3 *Levinz*. 406. *Godbolt* v. *Freeſtone*. *Salk.* 591. *Abbott* v. *Burton*, and both recognized in 2 *P. Wms.* 138. *Harris* v. *Biſhop of Lincoln*, where the caſe in *Hob.* 31. was denied to be law.

his heirs on ſuch ſurrender were abſolutely new, and ſuch as if limited to his heirs, ſhould be taken by purchaſe, is alſo exploded by modern deciſions (*y*); it ſhould ſeem that the diſtinction above noticed is alſo antiquated as to copyholds.

Surrender paſſes only what the tenant has right to transfer.

Again, a ſurrender when conſidered as the mean of conveyance can, by the terms, paſs that only which the copyholder has to transfer (*z*). If a copyholder for life, therefore, ſurrender to another for the life of that other, it will only give the ſecond a right to an eſtate for the life of the firſt; even if a cuſtom be alleged to the contrary (*a*). If the lord, indeed, chooſes to admit the ſecond perſon to an eſtate for *his* life, it may operate as a grant; and the lord will be bound by his own act. But in that caſe, the ſecond perſon will not be in by the ſurrenderor, but by the lord (*b*).

The copyholder can only transfer his own intereſt and nominate another to take what he himſelf has to relinquiſh. He cannot convey what he has not: *that* cannot be transferred which is not in exiſtence. So if any further intereſt *be* in exiſtence and veſted in another

(*y*) See 1 *Fearne* 88. *&c.* and the caſes by him cited, and 1 *Strange* 487. *Smith* v. *Trigg*.

(*z*) See *Co. Copyh. ſ.* 34. *Tr.* 76.

(*a*) *Moore* 8. *ca.* 27. and ſee *Gilb. Ten.* 257. and *Watk.* No. CXIX. and CXX. *p.* 451-3.

(*b*) See *Watk.* No. CXIX. and CXX. to *Gilb. Ten. p.* 452. and ſee alſo 4 *Leon.* 88. *ca.* 184.

perſon,

perſon, the ſurrender of the immediate copyholder cannot convey ſuch further intereſt. He may transfer his own property; but not that of others. Hence a ſurrender ſhall paſs no more than what the perſon making it may lawfully paſs (*c*). It ſhall not work a wrong: ſurrender by the huſband will be no diſcontinuance of the wife's land (*d*).

A ſurrender by a tenant in tail may bar his iſſue; but this is on a different principle; which will be noticed in the chapter on entails (*e*).

Having thus conſidered the ſurrender as it reſpects the perſon who makes it, we will now enquire into its effects as it regards the ſurrenderee.

Surrenderee does not take ſtrictly as a *ceſtui que uſe*.

And in the firſt place it has been remarked that though a ſurrender is generally ſaid to be made *to the uſe* of another, yet the perſon in whoſe favour it is made ſhall take merely as a *nomince* or *appointee*: he is not properly *ceſtui que uſe*. The ſurrender is only a direction to the lord how to grant the lands. The eſtate remains in the ſurrenderor, and not in the lord. A ſurrender, therefore, is not to receive a conſtruction ſimilar to that of a uſe or truſt (*f*). A very

(*c*) *Co. Copyh. ſ.* 34. *Tr. p.* 76.
(*d*) 4 *Co.* 23. *a.*
(*e*) *Poſt. ch.* 4.
(*f*) *P. Holt*, C. J. in the caſe of *Fiſher* and *Wigg.* 1 *P. Wms.* 17. 1 *Lord Raym.* 627. and by *Hardwicke*, C. in the caſe of *Rigden* v. *Vallier*. 2 *Veſ.* 257. and ſee 1 *Brownl.* 127. *Allen* and *Naſh.*

A very extraordinary reaſon is, indeed, given for this in *Veſey*; which is that copyholds are not within the ſtatute of uſes. That copyholds are not within the ſtatute of uſes is certain: but it does not follow from thence that the perſon taken ſhould not have taken as *ceſtui que uſe* at common law. Had he taken as *ceſtui que uſe* before that ſtatute, he would have taken as ſuch after it: for the ſtatute would not have altered the nature of the thing; nor made it leſs a uſe, though it did not embrace copyhold property within its proviſions.

Before admiſſion he was ſaid to have neither a *jus in re* nor yet *ad rem.*

The ſurrenderee, therefore, taking merely as nominee, as the perſon expreſsly deſignated by the ſurrenderor for the admiſſion of the lord was not till ſuch admiſſion actually made (*g*) conſidered as having any thing in the premiſes: neither a *jus in re*, nor yet *ad rem.* But this indeed, was the language applied to the *ceſtui que uſe* of freeholds before the ſtatute.

He could not enter without conſent.

Such nominee could not, before admiſſion even have entered upon the lands ſurrendered to his uſe, without been regarded as a treſpaſſer (*h*): unleſs, indeed, it was by the permiſſion of the ſurrenderor; and then he was con-

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But the *ſurrenderor* has been conſidered as a *truſtee* for the ſurrenderee. See 1 *Durnf.* & *Eaſt*, 601-2. With reſpect, indeed, to the *Lord* he is merely a nominee. The lord is not *ſeized* to his *uſe.*

(*g*) For it is the admiſſion, and not the *preſentment*, which makes him tenant. See before *p.* 86.

(*h*) *Cro. Eliz.* 349. *Berry* & *Greene.* *Co. Copyh. ſ.* 39. *Tr. p.* 87.

ſidered

ſidered as his tenant at will (*i*). The ſurrenderor continuing tenant to the lord muſt, of conſequence, retain the poſſeſſion. He is anſwerable to the lord for the ſervices due, and therefore muſt be entitled to the profits and fruits of the premiſes. The ſurrenderor conſequently, and not the ſurrenderee, muſt be the perſon to maintain an action of treſpaſs (*k*).

Nor maintain treſpaſs.

Having therefore no eſtate in the premiſes, he has none to convey or to forfeit. He cannot ſurrender to the uſe of another; for he has nothing on which a ſurrender can operate (*l*). Should the lord, indeed, accept ſuch ſurrender, (or at leaſt what we muſt here call ſuch) and admit the ſecond nominee, it ſhould ſeem to be the better opinion that ſuch admiſſion would be good; though its validity has been controverted (*m*). Yet this would be in ſupport, and not in contradiction, of our poſition; ſince it only *implies* a *prior admiſſion*, and not that an admiſſion was *unneceſſary*.

Nor ſurrender to another.

As he has nothing to transfer, ſo he can have nothing to forfeit. If he commit felony and be attainted (*n*), or if he commit waſte (*o*), no forfeiture will enſue.

Nor forfeit.

The

(*i*) See *Watk.* No. CXXXVIII. to *Gilb. Ten. p.* 460.
(*k*) See before *p.* 94. and *Cro. Eliz.* 349. *Berry* & *Greene.*
(*l*) 1 *Brownl.* 143. *Wilſon* v. *Woddell.*
(*m*) See *Gilb. Ten.* 275. 281. *&c.* and *Watk.* No. CXXX. *p.* 457. and *Cro. Eliz.* 504. *Gyppen* & *Bunney.*
(*n*) See 2 *Wilſ.* 13. & 16. *Roe* d. *Jefferеys* v. *Hicks.*
(*o*) See *Co. Copyh. ſ.* 59. *Tr. p.* 137. *Sed quære de hoc.* And *quære* alſo, whether, if a ſurrenderee in poſſeſſion by conſent,

The ſurrenderee is now, however, regarded as having ſuch an intereſt in the premiſes as may be the object of a deviſe or aſſignment.

But he may now deviſe his intereſt.

Thus if a ſurrender be made, though out of court, to the uſe of *A.* and then *A.* deviſe all his lands to *B.* and die before any admittance be made; yet the copyholds ſo ſurrendered will paſs (*p*). For the teſtator had a title in equity to recover them; and, according to *Aſhhurſt* J. in the caſe of *Woollams* & *Clapham*, the vendor ſtood ſeized for him till a legal conveyance could be made: the ſurrenderor being conſidered as a truſtee for the ſurrenderee (*q*).

But an *heir* cannot deviſe before his admittance: for he has more than an equity. His intereſt may be ſurrendered on ſatisfaction of the fine (though by the way ſuch ſatisfaction of fine implies an admittance and acknowledges its neceſſity); unleſs, therefore, the heir ſurrender to the uſe of his will, his intereſt will not paſs by his deviſe (*r*).

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conſent, commit waſte and afterwards be admitted, the admittance ſhall relate back to the ſurrender and ſo make it a forfeiture? Or whether the ſurrenderor ſhall be anſwerable for it, it being done by a perſon who occupies by his permiſſion and he continuing tenant? See *Moore* 49. *pl.* 149. and *Gilb. Ten.* 235. (*d*). If waſte be committed, the lord muſt have a remedy: the ſurrender muſt not be turned to his prejudice.

(*p*) 2 *Chan. Rep.* 4. *Davies* & *Beverſham. Nelſ. Ch. Rep.* 76. S. C. 2 *Freem.* 157. S. C. and ſee 1 *Durnf.* & *Eaſt*, 601. S. C. cited.

(*q*) See 1 *Durnf.* & *Eaſt* 601-2. *Holdfaſt* d. *Woollams* v. *Clapham.*

(*r*) See 1 *Strange* 487. *Smith* v. *Triggs.*

So

So if a ſurrender be made, the ſurrenderee may *aſſign* his intereſt, and the lord ſhall be compelled to admit (*s*). Or aſſign it.

But although the ſurrenderee has no eſtate in the premiſes till actual admiſſion, yet ſuch admiſſion, on being actually made, ſhall relate to the ſurrender and operate as from its date (*t*). But his admiſſion ſhall relate to the date of the ſurrender.

So ſoon as the ſurrender is made, ſo ſoon is the property bound: and from that time ſhall the eſtate be deemed in the ſurrenderee by relation, on the admiſſion being actually made.

Should the ſurrenderor die in the interim, *i. e.* between the ſurrender and admiſſion, he would, indeed, die ſeized of the premiſes; yet it would not be of an abſolute, but of a defeaſible eſtate of inheritance; and conſequently, though his heir would take by deſcent and his widow be entitled to dower, yet, on the admiſſion of the ſurrenderee, would ſuch eſtate be defeated; and, of conſequence, the deſcent and title to dower would be defeated alſo (*u*).

And, on the other hand, ſhould the ſurrenderee die before admiſſion, his heir would be entitled to admiſſion; and when admitted would

(*s*) See 2 *Durnf. & Eaſt*, 484. *The King* v. *Lord of the Manor of Hendon.* and *Gilb.* 285. and *Watk.* No. CXXXI. *p.* 458.

(*t*) 1 *Salk.* 185. *Benſon* v. *Scott.* See *poſt. chap.* 6. and 5 *Burr.* 2785. 2787. *Vaughn* d. *Atkins* v. *Atkins.*

(*u*) See *ante p.* 86. *Carth.* 275. *Benſon & Scott.* 3 *Leo.* 385. S. C. 1 *Salk.* 185. S. C. 12 *Mod.* 49. S. C. 5 *Burr.* 2764. 2787. *Vaughn* d. *Atkins* v. *Atkins.*

be in by deſcent: and the widow of the ſurrenderee ſhall have her freebench (*w*).

So, on ſuch admiſſion, all meſne acts of the ſurrenderor would be defeated (*x*), and thoſe of the ſurrendree effectuated and confirmed.

In ejectment, therefore, ſuch ſurrenderee may, after admittance, lay his demiſe in the interim (*y*), and recover the meſne profits from the time when the ſurrender was made (*z*).

If one joint-tenant ſurrender to the uſe of his will, his deviſee ſhall take: for the joint-tenancy would be ſevered from the time of the ſurrender (*a*).

If a copyholder ſurrender to the uſe of himſelf for life, with remainders over; and the ultimate limitation be to himſelf and his heirs; and *afterwards*, ſurrender to the uſe of his will, and actually execute ſuch will; and *after* ſuch ſurrender and will made, he be admitted on the *former* ſurrender, it will be no revocation of his will; but his admittance ſhall relate to the time of ſuch former ſurrender, and ſo be *prior* to the will (*b*).

(*w*) See *Gilb. Ten.* 220. 288. 5 *Burr.* 2764. *Vaughn* d. *Atkins* v. *Atkins.*

(*x*) *Carth.* 276. *Benſon* & *Scott.*

(*y*) 1 *Durnf.* & *Eaſt*, 600. *Holdfaſt* d. *Woollams* v. *Clapham.*

(*z*) See 2 *Wilſ.* 15. *Roe* d. *Jeffereys* v. *Hicks.*

(*a*) *Cro. Jac.* 100. *Porter* v. *Porter.* *Co. Litt.* 59. *b.* 1 *Brownl.* 127. *Allen* & *Naſh.*

(*b*) See the caſe of *Roe* d. *Noden* v. *Griffiths.* 1 *Juſt. Blackſt. R* 605, and 4 *Burr.* 1952.

Again,

Again, as the commiſſioners of a bankrupt are authorized by ſtatute to convey his copyhold eſtates by bargain and ſale enrolled without the intervention of a ſurrender; the admiſſion of the vendee ſhall have a ſimilar relation, and, therefore, it may not be improper to notice it here.

On the vendee's admittance he ſhall be in from the date of the bargain and ſale. Till ſuch bargain and ſale be executed the copyhold cannot be ſuppoſed to paſs from the commiſſioners; but to the time on which it is executed ſhall the ſubſequent admiſſion relate: and conſequently, the widow of the bankrupt, in caſe the bankrupt die after ſuch bargain and ſale and before the admiſſion of the vendee, ſhall not be entitled to her freebench; but her freebench, and all meſne acts of the bankrupt, ſhall be avoided on ſuch admiſſion being made (*e*).

We have already ſeen that the ſurrender is now only the formal mode of transfer containing the deſignation by the tenant of the perſon he wiſhes to ſucceed him in the tenancy. The copyholder has a right to nominate whom he pleaſes for that purpoſe (except indeed as to thoſe perſons who are legally incapacitated to take): and the lord is bound to admit ſuch nominee: He is compellable by decree in equity and by mandamus at law (*f*). He is

Lord is compellable to admit according to the ſurrender.

(*e*) See *Sir Wm. Jones*, 451. *Parker* v. *Bleake*. and *Cro. Car.* 568. S. C.

(*f*) See *ante p.* 61-2. and *poſt. ch.* 6. Of Admiſſion.

merely

that no ſubſequent manifeſtation of my intention can any way ſtrengthen it.

So, if three perſons ſurrender to the uſe of three or four of St. *Dunſtan*'s pariſh, not naming the pariſhioners by their names; this ſurrender is utterly void.

And ſo, if I ſurrender in the disjunctive to the uſe of *I. L. or I. N.* this is inſufficient for the incertainty (*m*).

Limitation of eſtates, by what words.

Again: as to the limitation of the uſe with reſpect to the creation of eſtates, we muſt remark that the ſame words are, generally ſpeaking, neceſſary to the creation of an eſtate in fee or in tail as are requiſite to create ſuch eſtates at common law (*n*).

For, in theſe caſes, at leaſt, a ſurrender is to be conſidered as a common law conveyance and is not entitled to the ſame favourable conſtruction as a will. And, therefore, according to the doctrine of *Lord Kenyon* in the caſe of *Wright* v. *Kemp* (*o*), "unleſs the ſurrenderor uſes the language which will confer a legal eſtate, it cannot be conferred. In deeds certain legal phraſes muſt be uſed, in order to create certain eſtates; as the word "heirs," to create a fee; and "heirs of the body," to create an eſtate tail. But beyond that, affirmed his lordſhip, I would ſay with *Lord Hardwicke* that there is no magic

Heirs.

Heirs of the body.

(*m*) *Co. Copyh. ſ.* 35. *Tr.* 80, 82.
(*n*) *Co. Copyh. ſ.* 49.
(*o*) 3 *Durnf. & Eaſt*, 473. and ſee *Lovell* v. *Lovell*. 3 *Atk.* 11. *Idle* v. *Cooke*. 1 *P. Wms.* 70. S. C. in *Salk.* *Lord Raymond*, &c. and *Sutton* v. *Stone*, *& al.* 2 *Atk.* 107.

in

in particular words, further than as they ſhow the intention of the parties.

But, though, generally ſpeaking, the ſame words are requiſite to create certain eſtates of copyholds as are neceſſary to the creation of the ſame eſtates of freehold lands, yet, by the force of a particular cuſtom, they may be otherwiſe created: thus, by ſpecial cuſtom, an eſtate of inheritance may be created by the words *ſubi* and *ſuis*; or *ſibi* and *aſſignatis*; or the like (*p*). So, in ſome manors the words, ſequels in right, are uſed inſtead of the technical word "heirs"; and in others in addition to it; as to *A.* his heirs and ſequels in right.

Sibi and *ſuis*.

Sequels in right.

Again, though, on a ſurrender being made and no uſe expreſſed, the law will preſume it to be a relinquiſhment of the ſurrenderor's intereſt, and ſo for the benefit of the lord (*q*); yet, if a ſurrender be ſo made, ſuch preſumption may be rebutted by a ſubſequent act, or precluded by the particular cuſtom of the manor.

No uſe expreſſed, but explained by admiſſion.

Thus a cuſtom for the lord to grant in fee, where there is no uſe expreſſed, is good (*r*). So if no uſe be expreſſed and the ſurrenderor accept a new admittance; the ſurrender ſhall be intended to be originally made to ſuch uſe as is ſpecified in the admittance, and the preſumption that it was for the benefit of the lord ſhall be rebutted by this explanatory act (*s*).

(*p*) 4 *Co.* 29 *b.* *Bunting* and *Lepingwell.*
(*q*) *Ante p.* 92.
(*r*) *Cro. Eliz.* 392. *Brown* v. *Foſter.*
(*s*) Caſes at the end of *Poph.* 125. *Brook*'s caſe. 2 *Rol' Abr.* 67 Grants. (K.) *pl.* 18. S. C.

To *A.* generally he ſhall take only for life.

If a ſurrender be made to the uſe of a ſtranger generally, and there be no ſpecial cuſtom preſcribing the eſtate he is to take, nor any explanatory act to enlarge the eſtate, he ſhall have it only for his life (*t*).

Surrender to be conſtrued as a conveyance at common law.

There is, indeed, a caſe which has been frequently acknowledged as an authority with reſpect to the conſtruction of a ſurrender, which appears difficult to reconcile with the doctrine before advanced that a ſurrender is to be conſtrued as a conveyance at common law: it is that of *Fiſher* and *Wigg* (*u*).

Caſe of *Fiſher* and *Wigg* examined.

The point in that caſe was, whether a ſurrender to the uſe of *A. B.* and *C.* and their heirs *equally to be divided* between them, *&c.* ſhould create a joint-tenancy or a tenancy in common: and it was determined by *Turton* and *Gould*, Juſtices, againſt C. J. *Holt*, that it ſhould be a tenancy in common.

And *Lord Hardwicke*, in the caſe of *Rigden* and *Vallier* (*w*), expreſſed a greater ſatisfaction with the arguments of the two juſtices than with thoſe of *Lord Holt*. Though he ſeemed, in that of *Lovell* & *Lovell* (*x*), to be of *Lord Holt*'s opinion, that a ſurrender ſhall be conſtrued as a deed.

(*t*) *Co. Litt.* 59. *b.*

(*u*) 1 *Lord Raymond.* 662. 1 *P. Wms.* 14. &c. and ſee 1 *Wils.* 341. *Cowp.* 660. 2 *Veſ.* 256, 257. 3 *Atk.* 734.

(*w*) 3 *Atk.* 734. and ſee 2 *Veſ.* 256, 7.

(*x*) 3 *Atk.* 11.

Now

Now it is laid down by *Lord Hardwicke* himſelf (*y*), that in conveyances in common law the words, *equally to be divided*, will *not* make a tenancy in common. If a ſurrender, therefore, is to be conſtrued as a conveyance at common law (*z*), ſuch words cannot make a tenancy in common in a ſurrender. A ſurrender muſt either operate as a conveyance at common law, or not as a conveyance at common law; if it *does* operate as a conveyance at common law, then the eſtate muſt be in joint-tenancy.

A diſtinction indeed, has been drawn with reſpect to conveyances at common law and deeds to uſes. And *Lord Hardwicke*, in the caſe of *Rigden* and *Vallier* (*a*) drew a further diſtinction between words of *limitation* and words of *regulation or modification* of an eſtate. But then, it is obſervable, he confined this diſtinction to *deeds to uſes*; *deeds at common law*, therefore, ſtand unaffected: and a ſurrender is to be conſtrued *as a deed at common law, and not as a deed to uſes*. In one thing, ſaid *Lord Hardwicke*, *Holt* was certainly right, that a ſurrender of copyhold lands to uſes is *not* to be conſidered on the foot of a uſe or truſt (*b*). If, therefore, a ſurrender is not to be conſidered

(*y*) 1 *Veſ.* 166. in the caſe of *Stone* v. *Howitly*. and 2 *Veſ.* 257. in *Rigden* v. *Vallier*.

(*z*) See *ante p.* 99.

(*a*) 2 *Veſ.* 257.

(*b*) 2 *Veſ.* 257.

as

as an inſtrument creating a uſe, but properly and ſtrictly as a common law conveyance, this diſtinction does not apply: and, conſequently, ſuch ſurrender muſt receive the ſame conſtruction as a deed at common law: and, conſequently alſo, if the words "to be *equally divided*" will *not* make a tenancy in common in a conveyance at common law, they *cannot*, according to the doctrine laid down even by *Lord Hardwicke* and other opponents of *Lord Holt*, themſelves, create a tenancy in common in a ſurrender. And, therefore, either the caſe of *Fiſher* and *Wigg*, though ſo repeatedly affirmed to be authority, muſt be given up as no authority at all, or we ſhall not be warranted in laying it down as law, though it be incontrovertibly laid down as law, that a ſurrender is to be conſtrued as a common law conveyance.

When a perſon named only in the *habendum* ſhall take.

The next matter to be conſidered, with reſpect to the conſtruction of a ſurrender, is the *habendum*. It has been the ſubject of much controverſy whether a perſon who was not named but in the *habendum* ſhould take.

And as to the *habendum* alſo, ſeveral diſtinctions have been made: as whether ſuch *habendum* be in an admiſſion on a ſurrender or on a voluntary grant: whether there be any cuſtom or not in the manor preſcribing, or at leaſt warranting, the form: and whether any one be named before the *habendum*, and then the *habendum* be to ſuch perſon with others, or whether there be no perſon before named.

If a ſurrender, therefore, be made without expreſſing any uſe, and afterwards the ſurrenderor

deror is admitted, *habendum* to him and his wife and the heirs of their bodies, the wife ſhall take an eſtate-tail as well as the huſband: for as the ſurrender was general, the ſubſequent admiſſion ſhall enure as an explanation of the intent of the ſurrenderor who ſhall now be conſidered as having ſurrendered to the uſe of himſelf and his wife, and their heirs, *&c.* according to the admittance (*c*).

But if the lord make *a voluntary grant* to a perſon, *habendum* to him and his wife and the heirs of their bodies; the wife ſhall *not* take: and that not only becauſe ſhe is not named in the premiſes, but alſo becauſe there is no preceding ſurrender to direct or guide the conſtruction of ſuch grant by which only the eſtate could paſs (*d*).

Again: a particular form of admiſſion or grant may be good in ſome manors from eſtabliſhed uſage, which, without ſuch uſage, would not be good. Thus it was obſerved by *Holt*, C. J. in the caſe of *Fiſher* and *Wigg* (*e*), that the reſolution before noticed in *Rolle* (*f*) was founded *upon the cuſtom of the manor.* And he affirmed that he knew manors where grants had been made to *R. habendum* to *A. B. C.* and *D.* where the firſt named took the whole for

(*c*) 2 *Roll. Abr.* Grants. *p.* 67. (K) *pl.* 18. *Brookes* v. *Brookes.*
(*d*) *Ibid. pl.* 19.
(*e*) 1 *Lord Raym.* 627.
(*f*) See the laſt page.

his life; and ſo every one in remainder in their order (*g*).

For where long uſage has eſtabliſhed a peculiar form, that form ſhould be complied with, And we find it noticed in *Crook's James* that, with reſpect to this inſtance of the *habendum*, in many manors there were no other forms of grant or limitation (*h*). And, in the caſe of *Downs* v. *Hopkins*, in *Crook's Eliz.* (*i*) ſuch *habendum* is ſaid to be common in copies. And, accordingly, *Holt* ſaid in the caſe of *Fiſher* v. *Wigg* (*k*), that if a cuſtom preſcribe a certain mode to paſs eſtates, and many grants have been made in the manner ſo preſcribed, ſuch grants will be good.

The next diſtinction is whether any perſon be named before the *habendum* or not: for if there be, as to *A. habendum* to *A.* and *B. B.* it is ſaid, ſhall not take (*l*), unleſs it be by a particular cuſtom authorizing ſuch mode of grant; as in the inſtance before given, to *R. habendum* to *A. B. C.* and *D.* where the firſt named took the whole for his life, and ſo every one in remainder in their order (*m*). But we may obſerve that a perſon may take by a deed at com-

(*g*) 1 *Lord Raym.* 627.
(*h*) *Cro. Jac.* 434. *Brooks* v. *Brooks. & al.*
(*i*) *Cro. Eliz.* 323.
(*k*) 1 *Lord Raym.* 627.
(*l*) See 2 *Roll. Abr.* 67. Grants. *pl.* 19. 20. 23. and ſee *Hob.* 313. *Windſmore* v. *Hobart.*
(*m*) 1 *Lord Raym.* 627. and *ante.*

mon

mon law *by way of remainder*, though he be not named in the premiſes with him to whom the eſtate is firſt limited (*n*).

If the *habendum* be to *A.* and *B.* and neither be named in the premiſes, they ſhall both take (*o*): and, this, perhaps, may hold as to a deed (*p*).

An eſtate cannot ariſe by implication in a ſurrender any more, it is ſaid, than in a deed at common law; as to the uſe of the ſecond ſon of the ſurrenderor after the death of the ſurrenderor and his heirs: for the ſurrenderor ſhall not have an eſtate tail (*q*). Implication.

Yet ſuch a limitation may be good by reaſon of the ſpecial cuſtom of a particular manor, according to *Holtsworth*'s caſe (*r*).

If, on a ſurrender, the uſes be at firſt well limited, and afterwards a repugnant clauſe be inſerted, ſuch clauſe ſhall not vitiate the preceding limitations, but be rejected as void and nugatory (*s*). Repugnant clauſe.

Whether a ſurrender may be made to commence *in future*, and whether a fee may be limitted Of a ſurrender to commence in future.

(*n*) *Cro. Jac.* 563. *Greenwood* v. *Tyler.*

(*o*) See 2 *Roll. Abr.* 67. *pl.* 18. *Brookes* v. *Brookes. Cro. Jac.* 434. S. C. and ſee *Gilb. Ten.* 259.

(*p*) See *Gilb. Ten.* 259.

(*q*) 1 *Brownl.* 127. *Allen* & *Naſh. Cro. Car.* 366. *Seagood* v. *Hone, & Ux.* and ſee *Gilb. Ten.* 259. 60. *Fearne* 416. 418.

(*r*) *Clayton's Rep.* 21. *ca.* 36.

(*s*) *Cro. Car.* 367. *Seagood* v. *Hone, & Ux.* and *Gilb. Ten.* 259.

Fee upon a fee.

mitted upon a fee in a ſurrender of copyholds, will be conſidered in a ſubſequent chapter (*t*).

Surrenders on condition.

A ſurrender may be made on condition; and this is moſt uſually done by way of mortgage The condition ſhould always immediately follow the ſurrender and be carefully inſerted in the court rolls; and it is then thus entered: the ſurrender is made in the general form to the uſe of *A. B.* and his heirs" with a proviſo to the following effect.

Entry on the roll.

"PROVIDED NEVERTHELESS, and upon condition, that if the ſaid *C. D.* his heirs, executors, adminiſtrators or aſſigns, ſhall and do well and truly pay, or cauſe to be paid, to the ſaid *A. B.* his executors, adminiſtrators or aſſigns, the full ſum of —— of lawful money of *Great Britain*, with lawful intereſt for the ſame, on the —— day of —— which will be *&c.* without any deduction or abatement whatſoever, for, or in reſpect of any taxes, rates, charges, aſſeſſments or impoſitions whatſoever, then the above ſurrender to be void, elſe to be and remain in full force and virtue."

Defeaſance.

The proviſo or condition is often contained in a deed entered into at the time the ſurrender is made; which deed is termed a *defeaſance*. But this mode ſhould never be recurred to when poſſible to be avoided. As the ſurrender is abſolute on the rolls, ſhould the defeaſance, a ſeparate inſtrument, be loſt, the proof of the

(*t*) *Ch.* 5. Of Remainders, Executory Intereſts and Truſts.

condition

condition might be difficu (m) "Of
possible. Besides, the ti 2 Ann. moran-
always appear on the cou C. D. C. D.
and not be dependant on C to en
agreements. If a defeas
it ought always, for this r
on the rolls.

As the surrenderor contin 118 Lary.
lord 'till the admission of the
as the surrender is made, in the case of a mort-
gage, only as a security for the money advanced,
the admission is usually delayed. Or, if the
surrender be made out of court, it is frequently
suffered to become void for want of a timely
presentment; when a new surrender is taken
(u).

In case the money be paid within the time prescribed by the condition, the surrenderee acknowledges the repayment and authorizes the steward to vacate the surrender. Such acknowledgment of satisfaction, the warrant to vacate, and the actual vacation of the surrender are then entered on the rolls: on which the surrenderor becomes possessed of his former estate, and is in *in statu quo prius*, without any readmission or fine (w). Acknowledgment of satisfaction, and vacation of surrender.

If the acknowledgment be made in court, let the homage find the surrender in the usual way, and then say, Acknowledgment in court.

(u) See 2 *Ves.* 300. *Fawcet* v. *Lowther.*
(w) *Cro. Eliz.* 239. *Simonds* v. *Lawnd.*

Fee upon a fee.

mitted u[illegible]D NOW, AT THIS COURT came the ſaid will b[illegible]. in his proper perſon, and acknowledged

Surrenders on condition.

[illegible] have received full ſatisfaction and payment of the ſaid ſum of ——, and all intereſt for the ſame, according to the form and effect of the ſaid ſurrender. *And thereupon* the ſaid *A. B.* and *C. D.* prayed that the ſaid ſurrender might be vacated; *And* the ſaid ſurrender is vacated accordingly."

Acknowledgment before the lord.

If it be made out of court, before the lord or ſteward ſay:

"BE IT REMEMBERED that on the —— day of —— the within named *C. D.* came before me ——— (lord, or ſteward, of the manor of *Fairhurſt*; *as the caſe may be*); and acknowledged to have received of the within named *A. B.* all principal and intereſt ſecured to him by the within ſurrender: and requeſted that the ſaid ſurrender be vacated accordinly."

Taken &c. *C. D.*

E. F. lord, or ſteward, of &c.

The caption certified.

This memorandum ſhould be endorſed on the copy of the ſurrender, and ſigned by the lord or ſteward and the party acknowledging ſatisfaction: and at the next court it ſhould be preſented;—thus

Entry on the roll.

"AND ALSO at this court it is certified by the ſaid ſteward, and thereupon the homage preſent, that out of court, and ſince the laſt court, *C. D.* one of &c. came before him, the ſaid ſteward in his proper perſon, and acknowledged,

ledged, &c." (*as in the memorandum*) "Of which acknowledgment and requeſt a *memorandum* was duly made, and ſigned by the ſaid *C. D.* and the ſaid ſteward, and now exhibited in open court: therefore the ſaid ſurrender is accordingly vacated and anulled."

If the acknowledgment cannot be made in court, or before the lord or ſteward, the acknowledgment and warrant (on the requiſite ſtamp) may be thus:

Warrant to vacate.

"I *C. D.* of, &c. hereby acknowledge to have this day received of *A. B.* &c. the ſum of —— in full ſatisfaction and diſcharge of all principal and intereſt ſecured to me by a conditional ſurrender made by the ſaid *A. B.* of certain copyhold premiſes by him then held of the manor of *Fairhurſt*, to my uſe, at a court held on the day of —— laſt: and therefore I requeſt and authorize you as ſteward of the ſaid manor to vacate ſuch ſurrender accordingly. *Witneſs* my hand &c."

To *E. F.* *C. D.*

Steward of the manor of *Fairhurſt*, in the county of ——.

Such is the formal mode of vacating a conditional ſurrender: but ſuch formal mode is by no means a matter of neceſſity. The condition is expreſs; that on payment of the money the ſurrender ſhall be void. On the money therefore being actually paid within the preſcribed

time, the ſurrender becomes void *ipſo facto*. An acknowledgment of ſatisfaction by the mortgagee is ſufficient: and ſuch acknowledgment is generally written in the margin of the roll immediately againſt the ſurrender, and ſigned by the ſurrenderee.

Releaſe of condition.

If the ſurrenderee has been regularly admitted, and the condition be not forfeited, yet the ſurrenderor may releaſe the condition by deed. For the ſurrenderee, on his admiſſion is become tenant to the lord, and the intereſt of the ſurrenderor may be relinquiſhed by his own act: hence no fine is payable on that event (*x*).

Releaſe of equity of redemption.

So, on breach of the condition, the ſurrenderor may releaſe his equity of redemption; and no fine will in conſequence be due (*y*).

Who may take advantage of the condition.

And here we may obſerve that the ſurrenderee of a copyhold is an aſſignee within the ſtatute 32 *Hen.* 8.; and may therefore take advantage of a condition broken (*z*). So, when ſuch condition is forfeited, the equity of redemption ſhall deſcend to the cuſtomary heirs or ſequels of the ſurrenderor, as the legal eſtate would have done (*a*).

On condition broken, the eſtate becomes abſolute;

If the ſurrenderee be admitted and the condition broken, the eſtate becomes abſolute

(*x*) *Cro. Jac.* 36. *Hull* & *Shar-brook.* and *poſt. ch.* 7. Of Fines.

(*y*) See *poſt. ch.* 7. Of Fines.

(*z*) *Bull. Niſi. Prius.* 161. *Watk.* No. LXXXIII. to *Gilb. Ten. p.* 429. and the authorities there referred to.

(*a*) 2 *Veſ.* 300. *Fawcet* & *Lowther.*

and

and in caſe the money be afterwards paid, there muſt be a re-ſurrender by the former ſurrenderee; and a regular admiſſion of the original ſurrenderor. and a re-ſurrender will give a new eſtate.

The eſtate is now changed. On the breach of the condition, the old eſtate was gone: On the re-ſurrender the perſon to whom it is made takes a new eſtate. If the former eſtate, the ſubject of the firſt ſurrender, had been derived *ex parte materna*, yet the new eſtate received by the re-ſurrender, will be taken by purchaſe, and ſhall deſcend to the *paternal* heirs (*b*). Taking therefore a new eſtate he muſt neceſſarily be re-admitted and pay a fine (*c*).

A copyholder may ſurrender to the uſe of a particular perſon with remainders over to others: but the doctrine of Remainders will be conſidered in a future chapter (*d*). Remainders.

The doctrine of entails of copyholds alſo, will be treated of at large under that Title (*e*). Entails.

So, a copyholder may ſurrender to ſuch uſes as he ſhall by will appoint, without a ſpecial cuſtom for that purpoſe: and, indeed if a ſpecial cuſtom were alleged to reſtrain him from doing ſo, it could not be ſupported (*f*). Surrender to the uſe of a will.

It is ſaid that, by ſpecial cuſtom, copyholds may be deviſed without ſuch ſurren-

(*b*) See 12 *Mod.* 49. *Benſon* & *Scott.* and *Harman* & *Ux* v. *Morgan*, now reported in 7 *Durnf.* and *Eaſt*, 103.
(*c*) See *poſt. chap.* 7. Of Fines.
(*d*) *Chap.* 5.
(*e*) *Chap.* 4.
(*f*) 3 *Bro. Chanc. Caſ.* 286. *Pike* v. *White.*

der

der (*g*): but by the general law of copyholds a ſurrender is abſolutely eſſential (*h*). The ſtatutes of *Henry* the Eighth and *Charles* the Second relative to wills do not affect them (*i*).

Entry of on the roll.

Such ſurrender is made in the common form; "To ſuch uſes, ends, intents, and purpoſes," or "to the uſe of ſuch perſon or perſons, and for ſuch eſtate or eſtates, ends, intents and purpoſes as the ſaid *A. B.* in and by his laſt will and teſtament, ſhall direct, limit, or appoint."

The eſtate remains in the ſurrenderor.

If a copyholder ſurrenders to the uſe of his will, the eſtate, notwithſtanding, remains in him and not in the lord (*k*), and, therefore, he may ſurrender it again to a ſtranger without a formal revocation of the ſurrender to his will (*l*).

Part undeviſed will deſcend.

So, if he die without a will, or, making a will, deviſe only a particular intereſt, as to *B.* for life, or in tail, the whole in the one caſe, and the undiſpoſed of part in the other, will deſcend to his cuſtomary heirs (*m*). And ſo alſo, if a copyholder ſurrender to the uſe of his will and deviſe to his cuſtomary heir, and die; the heir

(*g*) *Littlet. Rep.* 26 cites *Wrot*'s caſe.

(*h*) *Co. Copyh. ſ.* 36. *Tr.* 83. 4 *Co.* 24. *b. Murrell & Smith.*

(*i*) 2 *Atk.* 37. *Tuffnell & Page.* 1 *Veſ.* 225. *Attorney General* v. *Andrews. Harg. N.* (1) and (3) to *Co. Litt.* 111. *b.*

(*k*) 4 *Co.* 23. *b. Gravener & Ted.*

(*l*) *Ante p.* 94. *Cro. Eliz.* 442. *Fitch & Hockly.*

(*m*) *Cro. Eliz.* 442. *Fitch & Hockly*, and *ante p.* 94.

ſhall

ſhall be in by deſcent (*n*): for when an heir has that eſtate deviſed to him which he would have taken without ſuch deviſe he ſhall take by deſcent, whether it be a freehold or a copyhold eſtate. In ſuch caſe, therefore, the deviſe is inoperative, and the heirs ſhall take as if there had been no deviſe at all. And if there had been no deviſe at all, the eſtate continuing in the ſurrenderor would have deſcended, as if no ſurrender had been made: for ſuch ſurrender and teſtamentary declaration of uſes will *not* make a new eſtate (*o*).

Exchange.

If a copyholder ſurrender certain lands to the uſe of his will, and then exchange thoſe lands for others; the lands ſo taken in exchange muſt be ſurrendered to the uſe of his will or they cannot paſs (*p*).

Ultimate limitation of the old eſtate.

But, if a copyholder ſeiſed in fee, ſurrender to the uſe of his will, and afterwards ſurrender to particular uſes with the ultimate limitation to his own right heirs, he ſhall be in of his old eſtate; and may deviſe the reverſion without any freſh ſurrender or admiſſion (*q*).

If a copyhold, however, deſcend to the cuſtomary heir, ſuch cuſtomary heir muſt ſurren-

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(*n*) *Strange* 487. *Smith* v. *Trigg*, *Lutw.* 797. *Clark* v. *Smith*, and caſe of *Hurſt* v. *Morgan*, *Eaſt.* 28 *Geo.* 2. 1755. in *Chanc.* and on *Certif.* from *B. R.* 27 *Nov.* 1759. *MS.*

(*o*) See *ante* p. 95.

(*p*) 1 *Bro. Chanc. Caſ.* 588. *Frank* v. *Standiſh.* in *Scac.* cited in *Not.*

(*q*) 1 *Fearne's Conting. Rem.* 90. *Thruſtout* d. *Gower* v. *Cunningham*, and 2 *Inſt. Blackſt. Rep.* 1046. S. C.

der

der it to the uſe of his will, or he cannot deviſe it (*r*).

An equity may be deviſed without a ſurrender.

But where a perſon has only an equity in copyholds, ſuch equity will paſs by deviſe without a ſurrender: for of an equity no ſurrender can be made: nor can the deviſee require any admittance, as he will not become tenant to the lord (*s*).

If it be of a deviſable eſtate.

Yet this is to be underſtood of ſuch an equitable intereſt as would have been deviſable had it been of freehold lands; thus, if it be an equitable eſtate tail, it will not paſs. For, as in the caſe of an equitable eſtate tail in freehold lands a recovery is requiſite in order to deſtroy it (*t*), though it hath been formerly held otherwiſe (*u*), ſo in that of copyholds, the entail muſt be firſt docked, as if it were a legal entail: and the eſtate will not paſs merely by the deviſe (*w*).

Acceſſion of the legal fee.

But, if a copyholder, having an equity only, (as if he be a ſurrenderee,) make his will and deviſe; and after making his will, he take the *legal* eſtate by deſcent, and then die; yet the equity will, it ſeems, be bound. Had the legal fee not deſcended to him, the equity would cer-

(*r*) See *Str.* 487. *Smith* v. *Trigg.* and *ante p.* 121.

(*s*) 1 *Bro. Chan. Caſ.* 480. *Macnamara* v. *Jones.* 3 *P. Wms.* 360. *King* v. *King*, & Mr. *Cox's* note (1) & *poſt.*

(*t*) 1 *Bro. Ch. Ca.* 72. *Botcler* v. *Allington*, & *Salvin* v. *Thornton.* cited Mr. *Cox*'s note (2) to 1 *P. Wms.* 91. *Legate* v. *Sewell.*

(*u*) *Preced. in Chanc.* 228. *Woolnough* v. *Woolnough.*

(*w*) 1 *Hen. Blackſt.* 446. 461. *Roe* v. *Lawe.*

tainly

tainly pass (*x*). And it has been determined that, as to *freeholds*, the accession of the *legal* interest will be no revocation of a will; but the person having the legal fee shall still be subject to the equity (*y*).

Now where the rights and emoluments of the lord are not affected, there is no reason why copyholds should not be within the same rules. An uniform standard should be fixed; and copyholds follow closely on the rules of freehold (*z*).

In this case the lord would be injured. The *legal* fee, not passing by the will, descends to the heir of the testator. The person having the *legal* fee is still tenant to the lord. And the *legal* estate can only be transferred by surrender and admittance. By the conveyance of the *equity* the *tenancy* is not altered.

The Court of Chancery, would, therefore, I conceive, make the person having the legal interest surrender it according to the disposition of the equity.

By special custom, it is said, a feme covert may surrender to the use of her will with the assent of her husband (*a*). Who may surrender to the use of a will.

(*x*) See the case of *Davy* v. *Beversham*, or *Beardsham*. *Ante*.

(*y*) See *Parsons* v. *Freeman*. 3 *Atk*. 741. and *Dougl*. 718. *Doe* v. *Pott*.

(*z*) See as to *Recoveries*, last page, and 5 *Durnf*. & *East*, 104. *Roe* d. *Crow*. v. *Baldwere*, Resulting Use, *ante*.

(*a*) See *ante*.

But

But, if a feme ſole ſurrender to the uſe of her will, and afterwards marry, it will be a revocation, or at leaſt a ſuſpenſion of the ſurrender (*b*).

Joint-tenant.

A joint tenant may ſurrender to the uſe of his will: and though ſuch ſurrender be made out of court and not preſented till after his death, yet the jointure will be ſevered; and the deviſe of his moiety will be good (*c*).

Preſentment of a ſurrender to a will.

As to the preſentment of a ſurrender to the uſe of a will, when made out of court, ſee *ante p.* 84.

The ſurrender only embraces what the ſurrenderor has at the time of ſuch ſurrender made.

As the teſtamentary inſtrument operates only as a declaration of the uſes of a ſurrender, and as a perſon cannot ſurrender what he has not, it follows that, as ſuch teſtamentary inſtrument cannot have any effect where no ſuch ſurrender has been made, ſo no ſuch ſurrender can be made, when there is nothing to convey. A perſon can only ſurrender that which he has in him at the time (*d*): hence no after-purchaſed lands can paſs.

Hence lands purchaſed after ſurrender made, will not paſs.

If a perſon poſſeſſed of ſeveral copyholds ſurrender "*All* his copyhold tenements" to the uſe of his will, and, after ſuch ſurrender made, purchaſe other copyhold lands, and then make his will and deviſe "*All* his copyhold tenements;" the deviſe will not operate upon the

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(*b*) *Ambler.* 627. *George* v. ———.

(*c*) *Cro. Jac.* 100. *Porter* v. *Porter.* *Co. Litt.* 59. *b.* 1 *Brownl.* 127. *Allen* & *Naſb.*

(*d*) See 3 *Durnf.* & *Eaſt*, 365. *Goodtitle* v. *Morſe.* and 6 *Durnf.* & *Eaſt*, 63. *Doe* d. *Ibbott* v. *Cowling* & *Ux.* 1 *Anſtruther* 11. *Morſe* v. *Faulkener* & *al.*

after-

after-purchaſed lands. For as he could not ſurrender what he had not at the time of the ſurrender, the after purchaſed lands could not have been included in it; and no ſubſequent ſurrender was made.

Nor thoſe purchaſed after making of the will, though before ſurrender.

And, in order that a deviſe may operate on a copyhold, it is not only neceſſary that the copyholder ſhould be poſſeſſed of the lands at the time of making ſuch ſurrender, but alſo that he be poſſeſſed of them at the time of making the will: thus if a perſon having ſeveral copyholds make his will, and deviſe "all his copyhold tenements," or "all his real eſtate," generally, and then purchaſe other copyhold lands; and afterwards, ſurrender "all his copyhold tenements" to the uſe of his will: the copyhold lands which were purchaſed after the execution of the will, though before the ſurrender, will not paſs (*e*).

Codicil and republication.

But, if a perſon, having no copyholds at the time, make his will, and deviſe "all the reſt and reſidue of his eſtate of what nature, kind, or quality ſoever," and then purchaſe a copyhold eſtate and ſurrender it to ſuch uſes as he ſhould by his laſt will appoint; and after ſuch ſurrender, make a *codicil*, reciting and *ratifying* the will; the copyhold eſtate will paſs: for the codicil ſhall operate as a *republication*, and bring the will to the date of the codicil (*f*).

(*e*) 1 *Durnf.* & *Eaſt*, 435. N. (*f*). *Spring* d. *Fitcher* v. *Biles* & *al.* and *Harris* v. *Cutler*, there cited.

(*f*) *Dougl.* 716. N. (2). *Doe* d. *Pate* v. *Davy*. *Cowp.* 158.

If

Subsequent admission shall operate by relation and not revoke, but support, a will.

If a copyholder, seised in fee surrender to the use of himself for life, with remainders over, and the ultimate limitation to himself and his heirs; and *afterwards* surrender to the use of his will, and actually execute such will; and, *after* such surrender and will made, he be admitted on the *former* surrender, it will be no revocation of his will: But his admittance shall relate to the time of such former surrender, and so be *prior* to the will (*g*).

Will made *previously* to surrender.

If a copyholder surrender to such uses as he *shall* by his will appoint; the lands will pass by a will made *previously* to the surrender, if the testator was possessed of them at the time of such will being executed (*h*).

Testamentary disposition operates as an appointment.

As a testamentary disposition of copyholds is only a declaration of the uses of the surrender, it operates as an appointment and not as a will (*i*).

And the appointee shall be in by the surrender.

And, as on a power of appointment being executed, when it relates to common law property, the appointee shall be *in* under, and as if expressly named in, the instrument by which such power is created (*k*), so the devisee or ap-

(*g*) 4 *Burr.* 1952. *Roe* d. *Noden* v. *Griffith.* 1 *Just. Blackst.* 605. S. C.

(*h*) 1 *Durnf.* & *East.* 435. *Spring d. Titcher* v. *Biles,* in Note.

(*i*) 1 *Bulst.* 200. *Semain* v. ———. 2 *Vef.* 77. and see 3 *Brown. Ch. Ca.* 231.

(*k*) 2 *Vef.* 78. 2 *Atk.* 565. 568. *Cooke* v. *Duckenfield.* and see 1 *Fearne* 99. *Butl.* N. (1) to *Co. Litt.* 299. *b.*

pointee

named in the will or teſtamentary in-
nt ſhall be in by the ſurrender as if ex-
y named.

But as the teſtamentary inſtrument is ambu-
latory and not effectual till the teſtator's death, if the deviſee or appointee die in the teſtator's life time the appointment cannot take place (*l*). Appointee dying in teſtators life time.

As therefore ſuch teſtamentary inſtrument is to be conſidered as an execution of a power, and not ſtrictly as a will, it is enough if made purſuant to the directions of ſuch ſurrender; and need not be executed as a will is required to be executed for the paſſing of freehold lands. What ſhall be ſuch a will as to paſs the copyhold.

If a perſon, therefore, ſurrender to ſuch uſes as he ſhall by will appoint, a will, though atteſted by two witneſſes, or by one only, or not atteſted at all, will be ſufficient to paſs it (*m*). Unatteſted.

So, where a copyholder made his will atteſted by *three* witneſſes, and afterwards, cauſed ſuch will to be altered, by ſtriking out ſeveral deviſes, and a memorandum to be written, that he had examined, peruſed and approved of the will ſo altered; but did not republiſh it in the preſence of *three* witneſſes, but directed it to be written out fairly, and became delirious before

(*l*) 2 *Veſ.* 77. *Duke of Marlborough* v. *Lord Godolphin.*

(*m*) 2 *Atk.* 37. *Tuffnell* v. *Page.* 1 *Veſ.* 225. *Attorney General* v. *Andrews.* 2 *P. Wms.* 258. *Wagſtaff* v. *Wagſtaff.* 2 *Bro. Chanc. Ca.* 58. *Carey* v. *Aſkew.* 2 *Veſ. jun.* 228. 232. *Habergham* v. *Vincent.*

it was returned, it was held ſufficient, and a ſurrender decreed (*n*).

By parol. And it ſhould ſeem that a will by *parol* only would be ſufficient for this purpoſe. A will by *parol* was good as to lands *deviſable* by cuſtom before the ſtatute of frauds (*o*): and in the old writ of *ex gravi querela* the cuſtom was alleged generally, to deviſe by laſt will. It does not ſeem probable that a will in writing ſhould be required of a burgeſs or villein who were not permitted even to have their children taught to read without a licence from the lord (*p*) till they were enabled by ſtatute (*q*). The ſurrender of a copyhold is made to ſuch uſes as *A. B.* ſhall by his laſt will appoint: now I know of no law which ſays that ſuch laſt will muſt be in writing. It has been noticed above that where lands were deviſable by cuſtom ſuch deviſe need not be in writing: and it has been remarked alſo (*r*) that the ſtatutes of *Henry* the Eighth and *Charles* the Second, do not embrace a deviſe of copyholds. If, therefore, neither the general cuſtom, nor a poſitive law, nor the particular ſurrender require ſuch will to be in writing, what reaſon can be given why a will by *parol* ſhould not be good?

(*n*) 2 *Vern.* 498. *Burkitt* v. *Burkitt.*
(*o*) See *Co. Litt.* 111. *a.*
(*p*) See *Paroch. Antiq.* 401.
(*q*) *Stat.* 7 *Hen.* 4. *c.* 17. *An. Dom.* 1405.
(*r*) *Ante* 122.

So,

So an equity in copyholds will paſs by a will unatteſted, though ſuch will cannot be conſidered on the ſame principle as a will of the legal eſtate (*s*). Of an equity

But a deviſe of *cuſtomary* lands, as contradiſtinguiſhed from copyholds, muſt be executed according to the ſtatute of frauds; for they do not paſs by ſurrender (*t*). Of cuſtomary lands.

If, indeed, a particular mode of executing a will of copyholds be preſcribed, and certain ceremonies required by the ſurrender, ſuch mode muſt be purſued, and ſuch ceremonies obſerved, and the particular directions muſt be complied with, as to ſuch will; for otherwiſe it will not be an execution of the power. The will as to form muſt purſue the directions of the ſurrender.

If a copyholder therefore ſurrender to ſuch uſes as he ſhall appoint by his laſt will "to be by him ſigned, ſealed, and publiſhed, in the preſence of *three* witneſſes;" his laſt will muſt be ſigned, ſealed and publiſhed in the preſence of *three* witneſſes; for otherwiſe the copyholds ſhall not paſs (*u*). If it be atteſted by two witneſſes only, it will not be ſufficient: though a court of equity may, indeed, under certain circumſtances, aid ſuch defective execution as in the caſe of other powers (*w*). If three witneſſes are required, it muſt be ſo atteſted.

(*s*) *Tuffnell* v. *Page*, as above.

(*t*) *Ambl.* 299. *Huſſey* v. *Grills.* and ſee *ſtat.* 29 *Car.* 2. *c.* 3. *ſ.* 5.

(*u*) *Ambl.* 684. *Goodwin* v. *Kilſha.* and ſee 2 *Veſ. Jun.* 216.

(*w*) See *Cotter* v. *Layer.* 2 *P. Wms.* 623.

Copyholds paſs by a general deviſe,

And where copyhold lands are ſurrendered to the uſe of a will, they will paſs by a deviſe of land *generally*; as "all my real eſtate &c." notwithſtanding there are freeholds to anſwer the deviſe (*x*).

ſo they are made ſubject to debts by a general clauſe.

So, by ſuch general clauſe, they ſhall be made ſubject to debts: as if the will runs "as to all my wordly eſtate, I deſire all my juſt debts ſhall be paid." For, by Lord Commiſſioner *Aſhhurſt*, in the caſe of *Coombes* v. *Gibſon* (*y*), the doctrine is that where the introductory words make the real eſtate liable, it ſhall extend as well to the copyhold as to the freehold lands. The freehold is as unnatural a fund for the payment of debts as the copyhold. It was admitted if there had been no freehold, the copyhold would have been liable. If the freehold had been deviſed to one perſon and the copyhold to another, the freehold might have been firſt applied." And it was decreed that by ſuch general words both the freehold and copyhold were liable (*z*).

Surrender to will ſupplied.

But though a ſurrender is thus eſſential to the transfer of the tenant's intereſt in copyholds to a ſtranger, and the will merely a declaration of the uſes of ſuch ſurrender; yet, if a copyholder

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(*x*) 2 *Atk.* 85. *Tendril* v. *Smith.* 1 *Veſ.* 226. *Goodwyn* v. *Goodwyn.* 2 *Veſ.* 164. *Byas* v. *Byas.*

(*y*) 1 *Bro. Chan. Caſ.* *274.

(*z*) And ſee alſo 3 *Bro. C. C.* 257. *Kentiſh* v. *Kentiſh.* and 3 *P. Wms.* 96. *Harris* v. *Ingledew.*

deviſe

deviſe his tenements held by copy, without ſurrendering them to the uſe of his will, a Court of Equity will, under certain circumſtances, effectuate ſuch deviſe by ſupplying the defect; and compel the heir to ſurrender the premiſes according to the teſtamentary diſpoſition.

But equity will not interfere in a capricious or arbitrary manner. If the neceſſity or juſtice of the caſe does not demand it, the claimant muſt be left to his fate; and the heir is not to be diſinherited where it would be conſiſtent with juſtice that he ſhould ſucceed (*a*).

In caſes of moral obligation, as a proviſion for a wife (*b*) or child (*c*); or in favour of a creditor (*d*) or a purchaſor for valuable conſideration (*e*), the court will aid the defect and decree the heir to ſurrender.

As to children, the parent is under a natural and a moral obligation to provide for them. Though the general law or the particular cuſtom may entitle the eldeſt or the youngeſt child to enjoy the copyhold land of the parent in excluſion of the others, in caſes where the re- As to children.

(*a*) *Watkins.* No. LXX. to *Gilb. Ten.* 157. (*k*) *p.* 412.

(*b*) 2 *Veſ.* 582. *Tudor* v. *Anſon.* 1 *Veſ.* 228. in *Goodwyn* v. *Goodwyn.* 1 *Atk.* 385. *Smith* v. *Baker.*

(*c*) *Tudor* v. *Anſon,* and *Goodwyn* v. *Goodwyn.* and 3 *Bro. Ch. Ca.* 286. *Pike* & *White.*

(*d*) 1 *Veſ.* 215. *Ithell* v. *Beane. Tudor* v. *Anſon: ubi. ſup.* 1 *Bro. Ch. Ca.* 273. *Coombes* v. *Gibſon.* 3 *Ibid.* 257. *Kentiſh* v. *Kentiſh.* 2 *Bro.* 325. *Bixby* v. *Eley.*

(*e*) 2 *Chan. Rep.* 218. *Barker* v. *Hill.* 2 *Vern.* 165. and ſee 2 *Vern.* 564. *Taylor* v. *Wheeler.* and *Ibid.* 609. *Jennings* v. *Moore, & al.*

quiſite means have not been taken to impede the deſcent, upon principles of political wiſdom, yet ſuch poſitive law or cuſtom cannot reſcind or annul the parental obligation. Each child has equally a claim to its parents care. Whatever may be the rules of human inſtitution, there is a prior and tranſcendant law which is written with the finger of the Almighty on the heart of man. The individual, therefore, who impelled, by the powerful voice of nature, demonſtrates his deſire to comply with her dictates and fulfill thoſe obligations which heaven has impoſed, muſt peculiarly claim the aid of a Court of Equity, which by its benign interference may prevent ſuch deviſe from being fruſtrated by the rigid adherence to a poſitive law.

Each child having a natural claim on parental care, each muſt be equally entitled to ſuch equitable aid. If the eſtate deſcend to the eldeſt ſon, a ſurrender ſhall be ſupplied for the benefit of the other children: if the eſtate devolve to the youngeſt, the eldeſt has an equal right to demand the ſurrender in ſuch caſe as the younger had in the former (*f*). If the eſtate

(*f*) In the caſe of *Cooper* v. *Cooper*, 2 *Vern.* 265. the court would *not* ſupply the ſurrender: but that *was by reaſon of the circumſtances of the caſe.* Had thoſe peculiar circumſtances not exiſted, there is no intimation that the court would have denied it, and ſee 1 *P. Wms.* 444. *Drake* v. *Robinſon.* and 2 *Vern.* 165. where Lord Commiſſioner *Hutchins* ſaid that "there ought not to be one ſort of equity for an eldeſt, and another for a younger ſon."

is

is to deſcend to all the ſons, as in *Gavelkind*, the ſurrender ſhall be ſupplied for the daughters, or in favour of one ſon, if ſuch appears the intention of the parent, and the others would not be deſtitute (*g*).

The child entitled to the eſtate at law is equally entitled to a proviſion in equity. But if he be provided for at the time it is enough: it matters not by whom ſuch proviſion be made, ſo he have it. If he have it from a ſtranger it is ſufficient to induce, and to juſtify, the parent in precluding him from a ſhare in his own eſtates. If he have an equitable proviſion, it matters not though he have not the patrimony of a groat. Hence then it is true that the heir muſt not be *unprovided for*; but it is not accurate to ſay that he muſt not be *diſinherited.* (*h*).

But it is not the province of the court to preſcribe the quantum of ſuch proviſion, either with reſpect to ſuch heir or to the other children The parent is the only judge (*i*). The parent indeed, muſt not direct a mere illuſive ſhare; for that would, in fact, be no proviſion at all. But the parent is the beſt judge, not only of the

(*g*) 2 *Vern.* 163. *Bradley* v. *Bradley.* 6 *Vin. Abr. Copyh.* (*W. e.*) *pl.* 12. *Andrews* v. *Waller.*

(*h*) 1 *Atk.* 388. *Hawkins* v. *Leigh, & al.* 3 *Bro. Ch. Ca.* 229. *Chapman* v. *Gibſon. Ibid.* 286. *Pike* v. *White.*

(*i*) 1 *Salk.* 187. *Kettle* v. *Townſhend.* 3 *Bro. Ch. Ca.* 230. 231. *Chapmnn* v. *Gibſon.* 6 *Vin. Ab. Copyh.* (*W. e.*) *pl.* 12. *Andrews* v. *Waller.*

the merit, but of the wants of his children. Thoſe will have ſtronger claims to his protection who are incapable of protecting themſelves.

Grandchild. Whether a ſurrender ſhall be ſupplied for a grandchild does not appear to be abſolutely ſettled.

In the caſe of *Kettle* v. *Townſend* (*k*), Lord *Somers* declared that ſuch ſurrender *ſhould* be ſupplied: but his decree was reverſed in the Houſe of Lords. Yet, in the caſe of *Watts* v. *Bullas* (*l*), the Maſter of the Rolls expreſſed himſelf diſſatisfied with the reverſal; and ſaid that if the caſe had occurred at that time (1702,) the ſurrender *would* have been ſupplied; and that he had, and would, decree it ſo.

Lord Harcourt alſo, in the caſe of *Freeſtone* v. *Rant* (*m*), thought that a ſurrender *ſhould* be ſupplied in favour of a grandchild: as did Lord Chancellor *Cowper*, in that of *Furſaker* v. *Robinſon* (*n*), who both diſapproved of the caſe of *Kettle* v. *Townſhend* as determined in the Lord's. In *Chapman* v. *Gibſon* (*o*) the Maſter of the

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But where a child *has* an equitable proviſion, and the deviſe goes only to *increaſe* that proviſion, the court it is ſaid, will not aid: for by ſuch proviſion the obligation is ſatisfied; and as to the overplus he muſt be conſidered as a volunteer. See 3 *Bro. Ch. Ca.* 188. *Lindopp* v. *Eborall.* Yet ſee *Tudor* v. *Anſon.* 2 *Veſ.* 582.

(*k*) 1 *Salk.* 187.

(*l*) 1 *P. Wms.* 61.

(*m*) 1 *P. Wms.* 61. *Note* †.

(*n*) *Ibid.* & *Preced. in Chanc.* 477.

(*o*) 3 *Bro. Chanc. Ca.* 231.

Rolls

Rolls appears to have been of the ſame opinion (*i. e.* that the ſurrender *ought to be* ſupplied;) but ſaid that it would be for the court to determine when the caſe ſhould come before it," and, conſequently, he did not conſider the doctrine as ſettled by the caſe of *Kettle* and *Townſhend.*

Lord Hardwicke, indeed, in the caſe of *Elton* v. *Elton* (*p*) ſaid that the court would *not* ſupply ſuch ſurrender; and recognized the caſe of *Kettle* and *Townſend* in the Lords. And he ſeemingly alluded to it in that of *Goodwin* v. *Goodwin* (*q*); and it was before recognized in caſe of *Strode* v. *Lord Faulkland* and others (*r*).

In the caſe of *Allen* v. *Poulton* (*s*) Sir *William Forteſcue*, then Maſter of the Rolls, *ſupplied* ſuch ſurrender againſt the eldeſt ſon of the teſtator: though perhaps that was on the principle that a perſon claiming under a will (which the eldeſt ſon did) muſt admit the whole.

Upon the whole therefore, we have the opinions of Sir *John Trevor*, Lords *Somers*, *Harcourt*, and *Cowper*, and Sir *R. P. Arden* againſt the determination of the Lords in the caſe of *Kettle* and *Townſend*, with very powerful reaſons in their ſupport: whereas Lord *Hardwicke* ſeemed to have conſidered the doctrine as ſettled by that caſe, and, therefore, went but little

(*p*) 3 *Atks.* 508.
(*q*) 1 *Veſ.* 228.
(*r*) 2 *Vern.* 625.
(*s*) 1 *Veſ.* 121.

into

into its principle. The caſe of *Allen* and *Poulton* alſo, ſo far as it goes, is againſt it.

Natural child. In the caſe of *Furſaker* v. *Robinſon* (*t*), the Maſter of the Rolls refuſed to ſupply a ſurrender on behalf of a natural child: and the doctrine was recognized by Lord *Hardwicke* in that of *Tudor* v. *Anſon* (*u*).

Wife. A ſurrender ſhall always be ſupplied for a wife, where an equal moral obligation would not be violated in giving her relief (*w*). A ſurrender, therefore, ſhall be decreed againſt a nephew or niece (*x*), but as a perſon is under an equal moral obligation to provide for his children, they ſhall not be permitted to go deſtitute in order to ſupport a bequeſt to her (*y*); but ſhe may ſhare the property with them (*z*).

But it is not neceſſary, in order to have a ſurrender ſupplied in her favour, that ſhe be entirely unprovided for: the huſband is the judge of the ſufficiency of her proviſion (*a*).

Brother and ſiſter. But the ſame moral obligation not extending to collaterals, the court will not ſupply the ſurrender to effectuate a deviſe from a brother to a ſiſter (*b*); *a fortiori*, if the brother

(*t*) *Preced. in Chanc.* 475.
(*u*) 2 *Veſ* 582.
(*w*) 3 *Bro. Ch. Ca.* 232.
(*x*) *Ibid.* 229. *Chapman* v. *Gibſon.* and ſee 1 *Atk.* 385, *Taylor* v. *Taylor.*
(*y*) See *Ibid.* and 1 *Atk.* 568. in the caſe of *Hervey* v. *Hervey.*
(*z*) See 2 *Veſ.* 582. *Tudor* v. *Anſon.*
(*a*) 1 *Atk.* 568. 2 *Veſ.* 582. *Tudor* v. *Anſon.*
(*b*) 1 *Veſ.* 228. *Goodwyn* v. *Goodwyn.* 2 *Atk.* 304. *Trodd* v. *Downs.*

and

and ſiſter be of the half blood to each other (*c*).

So, it ſhall not be ſupplied in favour of a nephew (*d*), or couſin (*e*); and of conſequence, not for a mere volunteer; as a legatee (*f*) or deviſee (*g*) who is not related in blood. Nephew or couſin. Volunteers.

As to creditors, we have ſeen that, on a general deviſe for payment of debts, copyholds, *if ſurrendered to the uſe of a will*, will paſs though there are freeholds (*h*). Creditors.

But if the copyholds are *not ſurrendered*, the court will not ſupply a ſurrender *on a general deviſe for payment of debts*, if the freeholds will ſuffice to pay them (*i*).

But where a perſon, having both freehold and copyhold property, *expreſsly directed* that his *copyholds* ſhould be ſold for payment of debts, and then deviſed his freeholds to his wife and daughter, a ſurrender was *ſupplied:* but in that caſe the daughter was alſo the cuſtomary heir (*k*).

(*c*) See 3 *Atk.* 189. in the caſe of *Goring* v. *Naſh.*

(*d*) 2 *Vern.* 621 & 625. Sir *L. Strode* v. *Dom. Ruſſell* & *Falkland.* 3 *Chan. Rep.* 169. S. C. 3 *Bro. Ch. Ca.* 170. *Marſton* v. *Gowan.*

(*e*) 2 *Veſ.* 582. *Tudor* v. *Anſon.*

(*f*) *Abr. Ca. Eq.* 122-4.

(*g*) 1 *P. Wms.* 354. *Vane* v. *Fletcher.*

(*h*) *Ante p.* 132.

(*i*) *Ca. Temp. Talb.* 78. *Mallabar* v. *Malabar.* and 3 *Bro. Ch. Ca.* 188. *Lindopp* v. *Eborall.*

(*k*) 2 *Bro. Ch. Ca.* 325. *Binby* v. *Eley.*

So,

So, if a copyhold be ſpecifically deviſed to one perſon and a freehold to another, it ſhould ſeem that the freehold ſhould be firſt applied (*l*). For the point here is whether a ſurrender ſhall be ſupplied in favour of the *creditors*, and not whether the ſurrender ſhall be ſupplied in favour of the *deviſee*. In this caſe neither the freehold nor copyhold is ſpecifically, or even generally, charged: and copyholds are not aſſets at law (*m*). But freeholds are not only aſſets in the hands of the heir, but now alſo, by ſtatute, are ſubject to debts in thoſe of the deviſee (*n*). The creditors therefore, who have ſpecialties may avail themſelves of the freeholds; and if, from ſuch freeholds, they are fully paid, they will ceaſe to be creditors; and the queſtion will be at an end. In caſes, indeed, where the creditors are only by ſimple contract, and ſo cannot reſort to the freeholds either from the aſſets not being equitable aſſets or from there being no perſonals exhauſted by the ſpecialty creditors to enable them to take their places, a ſurrender muſt be ſupplied on the principles of common juſtice and equity.

Surrender ſupplied for a limited intereſt.

If a copyhold be deviſed to a perſon for whom the teſtator was obligated to provide, as a wife

(*l*) See 1 *Bro. Ch. Ca.* *274. *Coombes* v. *Gibſon.* and 2 *Ibid.* 325. *Bixby* v. *Eley.*

(*m*) 4 *Co.* 22. *a.*

(*n*) *Stat.* 3 & 4 *Will.* & *Ma. c.* 14.

for

for inſtance, with remainder over to a perſon to whom ſuch obligation would not extend, as to a nephew or niece, the court will aid the particular deviſe but not the remainder over. The limited intereſt ſhall be ſupported; but the reſidue ſhall reſult to the cuſtomary heir (*o*).

So, if a deviſe be for payment of debts, and ſubject to ſuch payment, to ſtrangers; it ſeems to follow, on the ſame principle, that the heir ſhall not be compelled to ſurrender or make a title to more than is ſufficient to ſatisfy the debts: for the heir has equal equity, at leaſt, with the deviſee; and where the equity is equal, the law muſt prevail (*p*).

So as to remainders to ſons, &c.

But if the deviſe be to perſons within ſuch obligation, a ſurrender ſhall be ſupplied, though the eſtate for which it is ſupplied be in remainder.

As if a copyholder deviſe to his grandſon for life, with remainder to his firſt and other ſons, remainder to his daughters in tail, with remainder to his younger ſon in fee, and the grandſon die without iſſue; a ſurrender ſhall be ſupplied in favour of the younger ſon againſt the deviſee of the grandſon; though the grandſon was the heir of the teſtator and had ſurrendered to will (*q*).

So, if a father, ſeiſed of copyhold lands, limit them to a firſt ſon in tail, and a ſecond ſon, and

(*o*) 3 *Bro. Ch. Ca.* 170. *Marſton* & *Gowan.*
(*p*) See 2 *Bro. Ch. Ca.* *386. *in Compton* & *Collinſon.*
(*q*) *Ca. Temp. Talb.* 35. *Cook* v. *Arnham.*

a third

a third, fourth, and fifth ſon; and there be no ſurrender; and the ſecond ſon bring a bill, who is to take in poſſeſſion, to have it ſupplied; the court will decree it for the third, fourth, and fifth ſons, as well as the ſecond; conſidering it as intended for a proviſion; and in the ſame order as the father had left it (*r*).

So, if the eſtate of the teſtator himſelf had been only in remainder; as if he had deviſed a remainder on an eſtate for life; the ſurrender would have been equally ſupplied (*s*).

Heir put to his election.

But though a ſurrender of copyholds ſhall not be ſupplied againſt the heir in favour of volunteers, yet, as the teſtator has a power to deviſe his freeholds to whom he pleaſes, if he deviſe his freeholds to his heir and his copyholds to a ſtranger, the heir ſhall, in many caſes, be put to his election.

Thus where a teſtator having ſeveral copyholds, part of which he had ſurrendered to the uſe of his will and part had left unſurrendered, deviſed to his heir and the heirs of his body; and in his will recited that as to ſome part of his copyholds, he was not enabled to deviſe them by reaſon of their not being ſurrendered, and that therefore, ſuch part would deſcend to his heir, and, in conſequence, directed his heir to ſurrender to the truſts he had created; and on his refuſal ſo to do ordained that the eſtate limited to him and the heirs of his body ſhould

(*r*) See 3 *Atk.* 191-2. in *Goring* v. *Naſh.*
(*s*) See *Ca. Temp. Talb.* 37. in *Cook* v. *Arnham.*

ceaſe,

ceaſe, and the remainders take effect in poſſeſſion; the heir was decreed to ſurrender the premiſes (*t*).

So, where a teſtatrix, being ſeized of freehold eſtates, and ſome copyhold lands lying diſperſedly, and having ſurrendered her copyhold eſtates to the uſe of her will, by her will deviſed all her real eſtates, as well freehold as copyhold; and gave Lady *Standiſh*, who was one of her co-heirs at law, 1,000*l.* and after the making of her will, exchanged thoſe copyhold lands for others; which were ſurrendered to her; but did not ſurrender thoſe to the uſe of her will; Lady *Standiſh* was put to her election, and, on her having elected to take the 1,000*l.* the court decreed that ſhe and the other co-heirs ſhould ſurrender the copyholds to the uſes of the will (*u*).

Again, where the teſtator had done all in his power to comply with the requiſite forms but was prevented by the acts or refuſal of others, the court has, in many caſes, decreed a ſurrender.

As where a perſon entitled to an equitable eſtate tail in a copyhold, endeavoured to get in the legal eſtate to the intent he might have made a regular and proper ſurrender; but the truſtees refuſing to comply, he brought a bill to enforce them; and repaired to the Lord's court,

(*t*) 3 *Bro. Chanc. Ca.* 116. *Wardell* v. *Wardell.*

(*u*) 1 *Bro. Ch. Ca.* 588. *Frank* v. *Standiſh* in *Scacc.* in Not.

and

and made, or tendered to make, ſuch ſurrender as he could; it was held ſufficient to bar the entail of the truſt and that the deviſe was good (*w*).

So, in the caſe of *Vane* v. *Fletcher* (*x*), the Lord Chancellor ſaid that if the *heir* had done any thing himſelf to prevent the acceptance of a ſurrender it would have been material: And we are told by the reporter that it did not appear, after all, that the *teſtator had done* all in his power, for the making of the ſurrender; *for which reaſon* the title to the copyhold premiſes was declared by the court to be in the heir.

So, where a copyholder cannot ſurrender by reaſon of the alienation of the freehold of the premiſes, the court will effectuate his diſpoſition (*y*).

Surrende preſumed by reaſon or poſſeſſion.

If poſſeſſion has been long peaceably held, (as for forty years, for inſtance,) and eſpecially if the Rolls are loſt, a ſurrender ſhall be preſumed. A ſurrender to a will being frequently made out of court, it may often be loſt or forgotten by the ſteward, and ſo not inſerted on the Rolls, without any default of the copyholder (*z*).

Againſt whom a ſurrender ſhall be ſupplied.

We have already ſeen that a ſurrender ſhall not be ſupplied in favour of a volunteer againſt a child, who would, in conſequence, be left unprovided for.

(*w*) See 2 *Vern.* 583. *Otway* v. *Hudſon*, & *al.*
(*x*) 1 *P. Wms.* 354-5.
(*y*) 4 *Co.* 25. *a.* *Murrell* and *Smith.*
(*z*) 1 *Vern.* 195. *Lyford* v. *Coward.*

But

But a ſurrender ſhall be ſupplied, in favour of a wife, againſt a diſtant heir; as a nephew or niece (*a*). Nephew, &c.

So it ſhall be ſupplied againſt a deviſee (*b*). Deviſee.

So, againſt a purchaſer *with* notice (*c*): but not againſt a purchaſer *without* (*a*); for he has an equal equity; and where the equity is equal he who has the legal eſtate muſt prevail. Purchaſer *with* notice.

So, it ſhall be ſupplied againſt the aſſignees of a bankrupt (*e*). Aſſignees of a bankrupt.

So, where a copyhold is granted for lives, and the firſt taker has power to diſpoſe of it, a ſurrender ſhall be ſupplied againſt the perſon next in ſucceſſion, equally as againſt the heir in the caſes of inheritance (*f*). Tenant for life.

But as copyholds are equally liable to agreements as freeholds are, if the copyholder enter into an agreement for a valuable conſideration, his heir ſhall be decreed to ſurrrender (*g*): though he be heir in borough Engliſh (*h*), or ſeveral be heir in gavelkind (*i*). Heir.

So, againſt the widow claiming her free-bench (*k*). Widow.

(*a*) 3 *Bro. Ch. Ca.* 229. *Chapman* v. *Gibſon.*
(*b*) *Ca. Temp. Talb.* 35. *Cook* v. *Arnham.*
(*c*) 2 *Vern.* 609. *Jennings* v. *Moore.*
(*d*) *Ibid.*
(*e*) 2 *Vern.* 564. *Taylor* v. *Wheeler.* and 2 *Veſ.* 633. in *Hinton* v. *Hinton.*
(*f*) 1 *Chanc. Rep.* 274. *Greenwood* v. *Hare.*
(*g*) 2 *Veſ.* 633. *Hinton* v. *Hinton.*
(*h*) *Ibid.* 639. S. C.
(*i*) *Ante p.* 134.
(*k*) *Hinton* v. *Hinton.* 2 *Veſ.* 631. 638

Iſſue in tail.

But it ſhall not be decreed againſt an heir in tail, where the anceſtor enters into contract and dies without barring the entail; whether ſuch entail be with, or without, a remainder over (*l*).

A perſon having no intereſt at the time of contract.

If a perſon wrongfully admitted to a copyhold ſurrender it to the uſe of a purchaſer, and, after ſuch ſurrender, become entitled to the premiſes by right, the court will compel him to convey his intereſt accordingly, though it ſhould ſeem, it will not decree his heir to ſurrender in caſe he die; it being conſidered as a perſonal equity, attaching on the conſcience of the party buott ndeſcending with the land (*m*).

(*l*) 2 *Veſ.* 634.
(*m*) See 1 *Anſtruther* 11. *Morſe* v. *Faulkner & al.*

CHAP IV.

Of ENTAILS.

FEW ſubjects, perhaps, have been diſgraced with a greater ſhare of inconſiſtency and learned abſurdity and confuſion than that on which we are now to remark. But as error, however ſanctified, muſt continue to be error, and as abſurdity, however reverenced, muſt continue to be abſurdity, it becomes us with manly dignity to oppoſe their influence; and inſtead of puſilanimouſly ſubmitting to arbitrary aſſertion endeavour to reſcue the ſubject before us from the conſecrated nonſenſe which it has been doomed to ſuſtain. Hiſtory of entails.

We find it repeatedly declared that eſtates tail were unknown 'till the ſtatute *de donis*; which ſtatute was enacted in the thirteenth year of King *Edward* the firſt (*n*).

Before that ſtatute, ſay they, all eſtates of inheritance were either in fee-ſimple abſolute or conditional.

But let us not be ſatisfied with aſſertion: let us enquire into the truth or error of the

(*n*) *A. D.* 1285.

doctrine before we ſubſcribe to this legal creed.

Feuds granted to a perſon and the heirs of his body.

We find from hiſtorical facts that feuds were given for life before they were given to a perſon and the heirs of his body: they were given to a perſon and the heirs of his body, before they were given to a perſon and his heirs, general, or indefinite. The *deſcendants* of the feudatory were admitted before his *collateral* relations. An eſtate tail, therefore, muſt neceſſarily (in reality, though not in terms) have preceded an eſtate in fee ſimple: for what was the *feudum novum* but an eſtate tail in effect? *Somner* ſays (*o*), that *beneficium* was *feudum's* elder brother; and was not the eſtate tail the elder brother of the fee ſimple (*p*)?

Feudum Novum.

Alienation of an eſtate limited to a perſon and the heirs of his body.

When a perſon was permitted to alien, he was permitted only to transfer his own intereſt. If he had an eſtate to himſelf and the heirs of his body, it was manifeſtly unjuſt for him to alien to another and *his* heirs general. He could not ſay to his lord, (or to him in remainder when remainders were allowed; and they were allowed on an eſtate to a perſon and the heirs of his body at a very early time (*q*); he could not ſay "though *my* collateral relations can have no claim to the premiſes, yet the col-

(*o*) *On Gavelk.* 102.

(*p*) *Watk.* No. LXXIX. *to Gilb. Ten.* 421.

(*q*) *Bract. Lib.* 2. *cap.* 6.

lateral

lateral relations of my alienee ſhall hold them in ſpite of you." Can it be ſuppoſed for a moment that, while the conſent of the lord was indiſpenſible to empower the tenant to alien, that he would have conſented to ſuch protraction of the eſtate? All that could be expected was to ſuffer the tenant to ſubſtitute the alienee for himſelf.

Among "the old and ancient cuſtoms of the manor of *Dymock* in the county of *Glouceſter*, uſed within the ſame manor by the cuſtomary and ancient demeſne tenants of the ſaid manor time out of mind of the remembrance of man," which were enrolled in *Chancery* in the time of Queen *Elizabeth* and confirmed by *Cromwell*, &c. we find a cuſtom alleged for the tenants to have their lands to them and the heirs of their bodies with power to alien to another and the heirs of *his* body; agreeably to the obſervations we have made (*r*).

The

(*r*) "*Imprimis* the cuſtom of the ſaid manor of *Dymock*, is and always hath been, for time out of mind, that the cuſtomary and ancient demeſne tenants of the ſame manor have uſed freely to have and to hold their lands and tenements within the manor aforeſaid to them and their heirs of their bodies lawfully begotten; the reverſion or remainder thereof in fee to the lord of the manor aforeſaid.

Item, That they have uſed always, all the time aboveſaid, when they be diſpoſed or will ſell, give, grant, or

Progreſs of alienation.

The policy however of free alienation for the purpoſes of commerce became every day more apparent. But it was not for the purpoſes of commerce only that free alienation became requiſite. An event of a moſt extraordinary nature was about to take place which accelerated the free alienation of property. The cruſades were to deſolate Europe.

Cruſades.

Now were ſeigniories and tenements to be converted into ſpecie. Now were ploughſhares to be turned into ſwords and pruning hooks into ſpears, for the holy purpoſes of human deſtruction. The baron muſt equip himſelf for his pious expedition: he required money; and he ſold his lands. The contagion was extenſive; and the tenant was alſo to fight the battles of his Lord. The baron anxious to encreaſe his followers willingly permitted his tenants to alien; and cared but little for the rights of reverter which were attached to

Conditional fees.

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alienate their lands or tenements to any perſon or perſons whatſoever, to make a *ſtate* thereof by free deeds indented, or poll deeds, to ſuch perſon or perſons whatſoever: To have and to hold to them and to their heirs of their bodies lawfully begotten; the remainder thereof to the lord and his heirs for ever; with licence of the lord of the manor in that behalf obtained."

Here then is an exiſting inſtance of the doctrine of conditional fees being withſtood

ſeigniories

ſeigniories he was about to diſpoſe of, or, which being temporal, he affected to deſpiſe (*s*).

But, even though the right of reverter was deemed of more importance by thoſe barons who remained at home, the probability of the particular tenements actually reverting was removed to a greater diſtance, by the tenant's having iſſue born (*t*). This circumſtance added to the cauſes we have mentioned, operated to countenance the doctrine about to be eſtabliſhed which was to enable the tenant on ſuch an event to alien in fee.

Power of alienation reſtrained with reſpect to eſtates tail.

But when the lords returned to the baronies they had left, and were again ſeated in the ſeats of their anceſtors, they thought very differently from what they did when preparing for their expeditions againſt thoſe whom they denominated the enemies of the Croſs of Chriſt. They then encouraged their tenants to alien that they might accompany them to the Holy land. They regarded but little the reverſion of tenements which, if it ſhould actually occur, they conceived they ſhould never enjoy. But theſe reaſons had ceaſed: and they now conſidered that as a wrong which before they regarded as expedient.

(*s*) *Watk.* No. LXXIX. *to Gilb. Ten.* 422.

(*t*) See 2 *Bl. Comm.* 110. *&c. ch.* 7.

Stat. *de donis.*

About the close of the thirteenth century the christians were expelled from palestine. *Edward*, who was afterwards *Edward* the first of *England*, returned from thence in the year 1272. In that of 1285, the celebrated statute *de donis* was enacted: and about 1291, we find palestine abandoned by the christians.

The statute *de donis* considered the alienation in fee, by a person who had the estate so aliened only to himself and the heirs of his body, as manifestly tortious and unjust, even though the tenant had issue: and, therefore, it was enacted that thenceforth the will of the donor should be observed; and the tenant should have no power to alien so as to defeat either his issue or the lord.

By this act the tenant was restricted even from transferring the estate limited to him and his issue, except indeed as to his own life: he could not convey it to another and the issue of that other: he could not substitute another person as to the tenancy; though the estate might possibly not be protracted.

The property was thus rendered inalienable both with respect to the issue and the lord: Hence another great end was accomplished; that of preserving the wealth and power of the barons: and hence has this famous statute been sarcastically denominated "THE STATUTE OF GREAT MEN."

The

The evil of rendering ſuch eſtates unalienable was found, however to be intolerable among an improving and commercial people, and ſeveral means have ſince been preſcribed for fruſtrating this proviſion of the ſtatute *de donis*. Right of alienation reſtored.

Having thus curſorily traced the progreſs of conditional fees and eſtates tail (*u*), we will proceed to enquire into the nature of that eſtate which may be granted by copy to a perſon and the heirs of his body. Of copyholds granted to a perſon and the heirs of his body.

Now it is eſtabliſhed that, if there be a cuſtom in a manor to grant a copyhold to a perſon and his heirs general, or in fee-ſimple, there a grant of a copyhold to a perſon and the heirs of his body is good; without any ſpecial cuſtom to warrant it. As a power to limit the largeſt eſtate which the law acknowledges neceſſarily includes the power of creating a leſs (*w*).

But the queſtion here is, Whether ſuch eſtate ſo limited to a perſon and the heirs of his body, be a fee-conditional, an eſtate-tail, or neither one nor the other?

Now it is argued that, as all eſtates of inheritance were, prior to the ſtatute *de donis*, either

(*u*) See *Watk* No. LXXIX. to *Gilb. Ten.* 418. where the ſubject is more fully treated on.

(*w*) *Cro. Eliz.* 373. *Stanton* & *Barnes.* and ſee 3 *Co.* 8. *a Heydon's* caſe. 4 *Co.* 23. *a. Bullock* & *Dibley.*

in

in fee-ſimple abſolute or conditional, (though by the bye, this is ſetting out with a tolerable ſhare of aſſumption,) the eſtate thus limited to a perſon and the heirs of his body, being an eſtate of inheritance and not in fee-ſimple abſolute, muſt of neceſſity have been a conditional fee at common law; and alſo muſt of conſequence continue to be ſo if the ſtatute does not extend to copyhold lands. The queſtion therefore returns, Does that ſtatute extend to copyholds or not?

It is urged on one hand that cuſtom without the ſtatute cannot poſſibly create an entail: and it is urged on the other that the ſtatute without cuſtom cannot poſſibly create one of copyholds: but we are told that by the ſtatute co-operating with the cuſtom an entail of copyholds may be created (*x*).

The queſtion, therefore, now is, what ſhall be ſuch a cuſtom with which the ſtatute may co-operate?

Fee conditional.

Now we find it expreſsly adjudged in ſeveral caſes (*y*), that the ſtatute ſhall not attach upon a mere limitation to a perſon and the heirs of his body; but that ſuch limitation will give a

(*x*) See *Co. Litt.* 60. *a.* & *b.*

(*y*) *Cro. Car.* 42. *Rowden* & *Malſter. Godb.* 367. S. C. and the caſes there cited.

fee

fee-conditional at common law; and that the tenant may alien in fee-ſimple immediately on iſſue had.

Many reaſons are given why the ſtatute ſhould not extend to copyholds. The moſt important are theſe: 1ſt, That it would alter the tenancy; as the donee muſt hold of the donor and not of the lord. 2dly, That the eſtate would be unalienable; as no time or recovery could deſtroy the entail: 3dly, That copyholders were at the time of making the ſtatute *de donis* only tenants at will, and their eſtates of too baſe a nature to be conſidered as within its proviſions (z). Reaſons againſt applying the ſtatute to copyholds.

As to the firſt of theſe reaſons we may obſerve, that the creation of tenure between the donee and donor is only by conſtruction of law; and cannot be applied to copyholds. If a perſon having an eſtate of *freehold* in fee-ſimple grant to another for life, or ſince the ſtatute *de donis*, give to another in tail, he only grants or gives a portion of his own eſtate; and is anſwerable for the whole ſeiſin to the lord. But, if a *copyholder* in fee ſurrender to the uſe of another for life, the tenant for life ſhall hold of the lord and not of him who ſurrendered to his uſe. Now, if the ſurrenderee for life ſhall not hold Thoſe reaſons conſidered.

(z) See *Rowden* & *Malſter*. *ubi ſup.* and 3 *Co.* 7. *a.* *Heydon's* caſe, &c.

of

of the ſurrenderor in this caſe, why ſhould the ſurrenderee in tail be conſidered as holding of neceſſity of him? That the donee muſt hold of the donor and not of the lord does not appear to be any wiſe *of neceſſity* in order to create an eſtate tail.

As to the ſecond reaſon, that if entails were allowed of copyholds it would be to create a perpetuity; as there would be no mean of deſtroying ſuch entail; the anſwer is, that this is contrary to fact: and that there are ſeveral ſuch means; as we ſhall preſently ſee.

As to the third reaſon, that a copyholder was only a tenant at will, we may reply that, though he be in ſtrictneſs only a tenant at will, he has a fee-ſimple *ſecundum quid.*

Caſes in which the ſtatute is ſaid to apply.

However, it is laid down in other books, that if a limitation of a copyhold to one perſon and the heirs of his body, with remainder over to another, has been cuſtomary in a manor; or if, on a grant to one and the heirs of his body, the iſſue has avoided the alienation of his anceſtor or recovered in a *formedon* in deſcender; it will, with the co-operation of the ſtatute, be a good entail (*a*).

(*a*) See *Ce. Litt.* 60. *b.* 2 *Veſ.* 601.

But,

But, if a limitation to a perſon and the heirs of his body with remainder over to another could have been *before* the ſtatute, and this muſt neceſſarily be pre-ſuppoſed before we can conceive ſuch ſtatute to *co-operate* with cuſtom, we may aſk what was the nature of the particular eſtate? Was a remainder permitted on a conditional fee? If not, and ſuch eſtate was, therefore, neither a fee-conditional nor an eſtate-tail, what appellation can be aſſigned to it? And, conſequently, as ſuch eſtate was certainly an eſtate of inheritance, and yet, as certainly, not an eſtate in fee-ſimple abſolute, if it was not a fee-conditional, how can it be true that *all* eſtates of inheritance were either in fee-ſimple abſolute or conditional before the ſtatute? Thoſe caſes examined.

If ſuch limitation had been by cuſtom, and the alienation of the anceſtor *could* have been avoided by the iſſue, the eſtate ſeems to have been that very eſtate which the ſtatute is ſuppoſed to have eſtabliſhed; and ſo to be properly an eſtate-tail (call it what you pleaſe) without its aid: ſince the direct end of the ſtatute was to prevent alienation. And, conſequently, ſuch eſtate would have been *before* the ſtatute.

As to avoiding the alienation by a *formedon* in deſcender, it may ſuffice to remark that the *formedon* muſt either have lain at the common

law

law (*b*) or been given by the ſtatute *de donis*; and, conſequently, if ſuch *formedon* was at the common law, it muſt have been *before* the ſtatute; and if not, it was the effect of that very ſtatute and not of any thing with which that ſtatute could co-operate.

Now, if a cuſtom to grant a copyhold in fee-ſimple will warrant a grant to a perſon and the heirs of his body with remainder over (*c*), ſuch limitation would have been good in all manors where a fee ſimple might have been granted; as well before as ſince the ſtatute. Since cuſtom muſt have been immemorial; and, conſequently anteriorly to ſuch ſtatute. Now, if the ſtatute will co-operate with ſuch limitation ſo as to effect an eſtate-tail, it ſeems to follow that entails may be effected in all manors where a grant in fee-ſimple is allowed.

Eſtates tail known *before* the ſtatute.

It ſhould ſeem, therefore, from what has been ſaid, that the eſtate which we now denominate an eſtate tail was known before the ſtatute *de donis*: it being apparent from the very words of the ſtatute that no new eſtate was introduced by it (*d*): That an eſtate to a perſon and the heirs of his body, which ſuch perſon had no power to alien, was not only

(*b*) See *Plowd.* 235. 2 *Inſt.* 336. *Co. Litt.* 60. *b.*
(*c*) *Stanton* v. *Barnes.* *ante p.* 47.
(*d*) And ſee *Wright's Ten.* 189.

compatible

compatible with the ancient feuds but indiſputably common (*e*): That power was in after times given to the tenant to alien on iſſue born for the purpoſes and reaſons before noticed: that the ſtatute took away ſuch power of alienation, and reſtored the ancient law: That if, when copyholds became grantable to a perſon and the heirs of his body, the law permitted him to alien, and ſo brought him within the miſchief of the act, there does not appear any good reaſon why he ſhould not be within its remedy: that it is no anſwer to this to ſay, that, if copyholds were within this ſtatute, they would become unalienable; for ſo were freeholds till fines and recoveries were permitted to be a bar: And as fines and recoveries are now bars to entails of freeholds, ſo recoveries and ſurrenders are now bars in the caſes of copyholds.

Though the doctrine, therefore, when diveſted of all its very learned obſcurity, appears thus ſimple and expreſs, yet it may be conceived frequently prudent to avoid the oppoſition of prejudice, or of a rigid adherence to what is deemed law as conſecrated by certain caſes and precedents, (however numerous the caſes and precedents which may be adduced to the contrary:) and in order to effect this end a *truſt* may be created whenever the cuſtom of the manor will warrant a grant in fee. For when-

Truſt of a copyhold may be entailed.

(*e*) See *ante p.* 148. 2 *Bl. Com.* 110. *ch.* 7.

ever

ever ſuch grants in fee are allowed, the copyholds, which may be ſo granted, may be entailed in effect: if not by cuſtom at law, they may be ſo in equity without it. For the cuſtom only binds the tenancy, and has nothing to do with the truſt. If a ſurrender be made to a perſon and his heirs, and a truſt be declared of ſuch eſtate to another and the heirs of his body, a court of equity will ſee it obſerved. The truſtee and his heirs are tenants to the lord; and the lord has nothing further to do with it. The truſt is between the tenant and the *ceſtuy que uſe*, and ſolely the ſubject of equity (*f*) The form of a deed, therefore, by which ſuch a truſt may be created, will be given at the end of this chapter.

Having thus conſidered the progreſs of fees conditional and eſtates tail, we will now enquire into the modes which have been adopted for the alienation or barring of ſuch eſtates.

Alienation of conditional fees.

We have already obſerved that, according to the legal idea of a conditional fee, it became immediately alienable in fee-ſimple on iſſue born. It was this power of alienation which was expreſsly reſtrained by the ſtatute *de donis*. Whenever, therefore, that ſtatute was not conſidered as extending to ſuch a limitation, the power of

(*f*) *Watk.* No. LXXIX. to *Gilb. Ten. p.* 426-7.

alienation

alienation continued. When ſuch a limitation of copyholds is only regarded as conveying a conditional fee, the perſon to whom it is ſo limited may, on iſſue had, convey it to another in fee ſimple by a common ſurrender (*g*).

Modes of docking eſtates-tail.

Whenever a limitation of copyhold property made to a perſon and the heirs of his body, is regarded as creating an eſtate tail, ſuch entail may be, by ſeveral means, deſtroyed: it having been long eſtabliſhed, in direct defiance of the ſtatute, that wherever an entail may be created, it may alſo be barred: for a perpetuity ſhall never in ſuch caſe be allowed. And ſo imperious is this rule of law, that no act of the party ſhall be ſuffered to counteract it.

Recovery.

The moſt general, the moſt ſolemn, and, according to Lord *Macclesfield* (*h*), the moſt proper way of barring the entail is by recovery in the Lord's Court, on a plaint, analogous to a recovery in the ſuperior Courts. And it ſhould ſeem, from ſeveral authorities, that ſuch recovery may be ſuffered in all manors in which an eſtate tail may be created, as an inſeparable concomitant, and without any

(*g*) *Cro. Car.* 42. *Rowden & Malſter.*

(*h*) 3 *P. Wms.* 10. in *Dunn* v. *Green.*

ſpecial cuſtom to warrant it (*i*); though other modes may be alſo uſed in the manor (*k*).

Manner of ſuffering it.

The form of ſuffering ſuch recovery in the manor Court is this:—

Let us ſuppoſe *Robert Brompton* to be tenant in tail and deſirous of barring the entail by reco-

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(*i*) See *Moore* 358. *Dell* v. *Higden*. 4 *Co.* 23. *a.* S. C. and ſee 1 *Roll. Abr.* 506. *Copyh.* (B) *pl.* 2. S. C. *Dub.* but cites *Morris*'s caſe as ſo adjudged *p. Cur.* and ſee *Gilb. Ten.* 176. as citing *Moore.* 753. *pl.* 1037. *Carter's Rep.* 9. 23. *p. Bridgman*, C. J. in *Taylor* v. *Shaw.* and ſee 2 *Veſ.* 604. *Carr* & *Singer.*

And it ſhould ſeem from *Carter* 22. &c. (*Taylor* v. *Shaw*) that a cuſtom to reſtrain a recovery would not be good. As a cuſtom to bar by forfeiture *non aliter:* the *non aliter* would be void. "If you allow a cuſtomary entail you muſt allow a cuſtomary recovery;" ſaid *Bridgman*, C. J.

And note; A recovery ſuffered in a manor Court can only be reverſed by petition to the lord, in the nature of a writ of falſe judgment. 1 *Vern.* 367. *Aſh* v. *Rogle*, and the Dean and Chapter of St. *Paul's.* and *Shower's Ca. in Parl.* 67. *Smith & Ux.* v. Dean and Chapter of St. *Paul's.*

If a perſon ſeiſed in tail of a copyhold ſuffer a recovery in the Lord's Court, the fee acquired by ſuch recovery will deſcend as the entail would have deſcended. *i. e.* If the recoveror had taken the entail *ex parte materna* the fee ſhall deſcend to his maternal heirs. 5 *Durnf. & Eaſt*, 104. *Crow* v. *Baldwere.*

(*k*) 2 *Strange*, 1197. *Everall* v. *Smalley.*

very;

very; in which recovery *Henry Wilſon* is to be tenant to the plaint, *Timothy Walgrave* demandant, *Robert Brompton* to come in as vouchee, and to vouch over *Edmond Akehurſt* the common vouchee of the Court.

In the firſt place let the copyholds be ſurrendered to the uſe of *Henry Wilſon*, to make him tenant to the plaint; and let *Henry Wilſon* be admitted in the uſual manner.

Then let the ſteward ſay:

"You, *Timothy Walgrave*, being now in court in your own proper perſon complain againſt *Henry Wilſon* of a plea of land (to wit) one meſſuage, &c. held of this manor by copy of court roll, at the will of the lord; and thereupon you pray proceſs to be awarded againſt im?

"But you *Henry Wilſon* voluntarily appear to anſwer to the ſaid *Timothy Walgrave?*

"And, thereupon, you, *Timothy Walgrave*, demand againſt the ſaid *Henry Wilſon* the tenements aforeſaid with the appurtenances, as your right and inheritance? And ſay that you were ſeized of the ſame in your demeſne as of fee and right, according to the cuſtom of this manor, at the will of the lord; and into which the ſaid *Henry Wilſon* has not entry but after the diſſeiſin of one *Hugh Hunt*, &c.?

" Whereupon you, *Henry Wilſon*, come and defend your right to the tenements aforeſaid with the appurtenances; and vouch over to warranty *Robert Brompton?*

" To which you, *Robert Brompton*, appear?

" And thereupon you, *Timothy Walgrave*, make the like demand againſt the ſaid *Robert Brompton* as againſt the ſaid *Henry Wilſon*; and ſay that you were ſeized of the tenements aforeſaid with the appurtenances in your demeſne as of fee and right, according to the cuſtom of this manor, at the will of the lord; and into which the ſaid *Robert Brompton* has not entry but after the diſſeiſin of the ſaid *Hugh Hunt*, &c.?

" Whereupon you, *Robert Brompton*, come and defend the right of the ſaid *Henry Wilſon* to the tenements aforeſaid, with the appurtenances; and further call to warranty *Edmond Akehurſt?*

" To which you, *Edmond Akehurſt*, appear?

" And, thereupon, you, *Timothy Walgrave*, make the like demand againſt the ſaid *Edmond Akehurſt* as againſt the ſaid *Robert Brompton*; and ſay that you were ſeized of the tenements aforeſaid w th the appurtenances in your demeſne as of

of fee and right, according to the cuſtom of this manor, at the will of the lord; and into which the ſaid *Edmond Akehurſt* has not entry, but after the diſſeiſin of the ſaid *Hugh Hunt*, &c.?

"Whereupon you, *Edmond Akehurſt*, come and defend the right of the ſaid *Henry Wilſon*; and ſay that the ſaid *Hugh Hunt* did not diſſeiſe the ſaid *Timothy Walgrave* of the tenements aforeſaid, as the ſaid *Timothy* does by his plaint above pretend and allege: and of this you put yourſelf upon this Court, *&c.*?

"And, thereupon, you, *Timothy Walgrave*, crave leave of this Court to imparl until four of the clock of the afternoon of this day?

"Therefore leave is granted to the ſaid *Timothy*, and alſo unto the ſaid *Edmond*, to the ſaid hour."

Here let *Timothy Walgrave* and *Edmond Akehurſt* leave the Court; and at four o'clock proceed: *Timothy Walgrave* being come into Court, but *Edmond Akehurſt* being abſent,

Then let the ſteward ſay:

"And now, after the imparlance to you by this Court given, you, *Timothy Walgrave*, appear?

"Therefore let proclamation be made that the ſaid *Edmond Akehurſt* appear alſo."

BEADLE, "*Oyez*, &c. *Edmond Akehurſt* come into Court and anſwer to *Timothy Walgrave* of a plea of land now pending between you; or judgment ſhall be entered againſt you for the tenements which he claims."

STEWARD, "*Edmond Akehurſt*, although ſolemnly called, having made default and ſtanding in contempt of this Court, let judgment be therefore entered againſt him that the demandant recover the tenements claimed."

Make three proclamations before judgment; thus:

BEADLE, "*Oyez*, &c. If any can ought ſay why *Timothy Walgrave* ſhould not recover againſt *Henry Wilſon*, *Robert Brompton* and *Edmond Akehurſt*, the tenements which he claims, let them come into Court and they ſhall be received."

STEWARD, "But as none appears—it is conſidered by this Court that the ſaid *Timothy Walgrave* recover his ſeiſin of the tenements aforeſaid with the appurtenances againſt the ſaid *Henry Wilſon*; and that the ſaid *Henry Wilſon* have of the lands and tenements of the ſaid *Robert Brompton* within the juriſdiction of this

this Court, (*l*) to the value of the tenements aforeſaid.

"And that the ſaid *Robert Brompton* have of the lands and tenements of the ſaid *Edmond Akehurſt*, within the juriſdiction of this Court, to the value of the tenements aforeſaid: and that the ſaid *Edmund Akehurſt* be in mercy."

"And in purſuance of this judgment, you *Timothy Walgrave*, pray the precept of this Court to be directed to *Iſhmael Cooke*, the bailiff or beadle of this manor, whereby you may be put into the peaceable poſſeſſion of the tenements aforeſaid with the appurtenances; according to the cuſtom of the ſame manor?

"Wherefore let ſuch precept iſſue; returnable here into this Court without delay."

BEADLE afterwards appears. STEWARD; "You, *Iſhmael Cooke*, the Beadle of this manor of *Fairhurſt*, appear, and ſay that you have delivered the full and peaceable poſſeſſion of the tenements aforeſaid to the ſaid *Timothy Walgrave*, as by the precept of this Court to you directed was commanded?"

(*l*) The recovery in value can be only for other copyhold lands within the ſame manor. See *Moore*, 358-9. *Dell & Higden.*

Then admit *Timothy Walgrave*; thus,

"And in confirmation and execution of the ſame recovery, the lord of this manor, by me his ſteward, now in full and open Court, grants ſeiſin of all and ſingular the tenements aforeſaid with the appurtenances, by this rod, according to the cuſtom of this manor, unto you, *Timothy Walgrave*; to hold to you the ſaid *Timothy Walgrave* and your heirs and aſſigns at the will of the lord according to the cuſtom, *&c.* by the rents, duties, and ſervices, *&c.*

Then let *Timothy Walgrave*, *Henry Wilſon*, *Robert Brompton* and *Edmond Akehurſt* ſurrender the tenements to the uſe of *Robert Brompton*, in the uſual form: and let *Robert Brompton*, be admitted.

The recovery, when ſuffered, is thus entered on the roll:

Entry on the roll.

"AT THIS COURT came *Robert Brompton*, one of the copyhold or cuſtomary tenants of this manor, in his proper perſon, and ſurrendered into the hands of the lord of the manor aforeſaid, by the rod, and acceptance of his ſaid ſteward, according to the cuſtom of the ſaid manor, *All* that copyhold or cuſtomary meſſuage, *&c.* *To the uſe* and behoof of *Henry Wilſon*, of *&c.* his heirs and aſſigns for ever: *To whom* the lord of the ſaid manor, by his ſaid ſteward, granted ſeiſin thereof, by the rod; *To have and to hold* the

the ſaid meſſuage, &c. unto him the ſaid *Henry Wilſon* his heirs and aſſigns for ever, at the will of the lord, according to the cuſtom of the ſaid manor; by the rents, duties and ſervices therefore due and of right accuſtomed. *And* he was admitted tenant thereof in form aforeſaid; but paid no fine to the lord, becauſe his eſtate was only had for a further aſſurance; and his fealty was pardoned.

And afterwards, at this ſame Court, came *Timothy Walgrave* in his proper perſon and complained againſt the ſaid *Henry Wilſon* in a plea of land, that is to ſay, of the ſaid meſſuage, &c. and made proteſtation to proſecute his ſaid plaint in this Court, in the form and nature of a writ of right patent at the common law, according to the cuſtom of the ſaid manor; and thereupon found pledges to proſecute the ſame in form aforeſaid; that is to ſay, *John Doe* and *Richard Roe*; and prayed that proceſs might be thereupon awarded, according to the cuſtom of the ſaid manor, againſt the ſaid *Henry*, returnable here, at this Court, without delay. But the ſaid *Henry Wilſon*, being preſent here in Court, voluntarily offered himſelf to anſwer unto the ſaid *Timothy Walgrave*, without ſuch proceſs unto him directed: whereupon, the ſaid *Timothy* demanded againſt the ſaid *Henry*, the ſaid meſſuage &c. within this manor and the juriſdiction of this Court, and held of this manor, by copy of court roll at the will of the lord, according to the cuſtom of this manor,

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thereupon to be had—Whether he had more right to have and to hold the ſaid meſſuage, &c. and premiſes before mentioned, with the appurtenances, as tenant thereof by his warranty, ſo as he now holdeth the ſame, or the ſaid *Timothy* to have and to hold the ſaid meſſuage, &c. and premiſes before mentioned, with the appurtenances, ſo as he above hath demanded the ſame? *And, thereupon*, the ſaid *Timothy* prayed licence to imparl until four of the clock in the afternoon of the ſame day; and it was granted; and the ſame time was given to the ſaid *Edmond*, there, &c. *And afterwards*, at the ſaid hour of four in the afternoon of the ſame day, the ſaid *Timothy* came again into Court; but the ſaid *Edmond* returned not there into Court, although he was ſolemnly called; but departed in contempt of the Court, and made default. Whereupon in full and open Court public proclamation was made, that if any one laid claim to the premiſes before mentioned, he ſhould come in before final judgment ſhould be given; but none came; *therefore*, according to the cuſtom of the ſaid manor, it was conſidered by the Court that the ſaid *Timothy* recover his ſeiſin againſt the aforeſaid *Henry* of the ſaid meſſuage, &c. and premiſes before mentioned, with the appurtenances; and that the ſaid *Henry* have of the lands and tenements of the ſaid *Robert*, within the juriſdiction, &c. to the value, &c. And that the ſaid *Robert* have of the lands and tenements of the ſaid *Edmond*, within the juriſdiction, &c. to the value &c. And that the ſaid *Edmond* be

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in mercy. *And thereupon* the ſaid *Timothy* prayed of the lord of the manor aforeſaid, a precept to be directed to *Iſhmael Cook*, the bailiff or miniſter of the Court aforeſaid, to cauſe him, the ſaid *Timothy*, to have full ſeiſin of the premiſes with the appurtenances; returnable then at the ſame Court without delay; and it was granted. *And afterwards*, at the ſame Court, came the ſaid *Iſhmael*, the bailiff or miniſter of this Court, and returned, that by virtue of the ſaid precept to him directed, he, the ſame day, cauſed the ſaid *Timothy* to have full ſeiſin of the ſaid meſſuage, &c. and premiſes before mentioned, with the appurtenances; as by the ſaid precept to him directed was commanded. *By virtue* of which recovery, and ſeiſin thereupon had, as aforeſaid, the ſaid *Timothy* entered into the ſaid meſſuage, &c. and premiſes above mentioned, with the appurtenances; and was thereof ſeized in his demeſne as of fee and right, at the will of the lord, according to the cuſtom of the ſaid manor: *And* being ſo ſeized, by virtue of the recovery and execution had and made in form aforeſaid, the lord of the ſaid manor out of his ſpecial favour, for the better approbation, ratification and confirmation of all and ſingular the premiſes, then in full Court, by his ſaid ſteward did give and deliver unto the ſaid *Timothy* of the ſaid premiſes, with the appurtenances, full ſeiſin by the rod; *To have and to hold* the ſaid meſſuage, &c. and all and ſingular the premiſes, with their appurtenances, unto him the ſaid *Timothy* his heirs and aſſigns for ever,

ever, at the will of the lord, according to the cuſtom of the ſaid manor; by the rents, duties, and ſervices therefore due and of right accuſtomed; but he paid no fine to the lord; becauſe this recovery was only had for further aſſurance; and his fealty was pardoned. And the ſaid *Timothy* was admitted tenant thereof in form aforeſaid accordingly.

And, afterwards, at the ſame Court, came the ſaid *Timothy Walgrave*, *Henry Wilſon*, *Robert Brompton* and *Edmond Akehurſt* in their proper perſons, and ſurrendered into the hands of the lord of the ſaid manor by the rod, and acceptance of the ſaid ſteward, according to the cuſtom of the ſaid manor, the ſaid meſſuage, *&c.* and all and ſingular the premiſes above mentioned with their appurtenances, ſo recovered as aforeſaid, *To the uſe and behoof* of the ſaid *Robert Brompton* his heirs and aſſigns for ever: *To whom* the lord of the ſaid manor, by his ſaid ſteward, did then and there grant ſeiſin thereof by the rod: *To have and to hold* the ſaid meſſuage, *&c.* and premiſes before mentioned, with their appurtenances, unto him the ſaid *Robert Brompton* his heirs and aſſigns for ever, at the will of the lord, according to the cuſtom of the ſaid manor; by the rents, duties, and ſervices thereof due and of right accuſtomed. *And* he was admitted tenant thereof in form aforeſaid: but paid no fine to the lord; becauſe this recovery was only had for further aſſurance; and he had aforetime made his fealty."

Secondly:

Secondly: An entail of a copyhold may be barred by forfeiture and re-grant. But this mode of barring an entail is only adopted in compliance with the eſtabliſhed uſage of the particular manor. If ſuch uſage be not preſcribed, a recovery or ſurrender is had recourſe to for effecting a bar. But a cuſtom to bar an entail by forfeiture and regrant has been adjudged good.* Forfeiture and re-grant.

As ſuch forfeiture and regrant are regarded as merely the inſtrument or form enabling the tenant to deſtroy the entail, they are conſidered as wholly ſubſervient to that end.

The tenant, therefore, uſually makes a leaſe without licence and not warranted by the cuſtom; or elſe ſurrenders to a purchaſer who makes ſuch leaſe; to the end that a forfeiture may be incurred, and the lands, on ſeizure, be regranted by the lord, to the perſon whom the leſſor ſhall name.

On ſuch leaſe, the lord ſeizes the copyhold as a forfeiture; and immediately regrants it to the perſon deſignated. For the whole procedure being a mere form for effecting a bar, the lord is only an inſtrument, and compellable to regrant to the perſon nominated, as in the caſe of a common ſurrender (*m*). The proceedings are thus entered:

(*m*) 2 *Saund.* 422. *Grantham* v. *Copley, & al.*

"AND

Entry on the roll.

"AND ALSO at this court the homage aforeſaid preſent that *A. B.*, one of the copyhold or cuſtomary tenants of this manor, did, on or about the —— day of —— now laſt paſt, being then ſeiſed of an eſtate tail of and in a certain meſſuage, *&c.* ſituate *&c.* within and held of the manor aforeſaid, at the will of the lord, according to the cuſtom of the manor aforeſaid, demiſe and leaſe the ſaid meſſuage *&c.* unto *C. D. &c.* for and during the term of ſeven years from thence enſuing without having previouſly obtained the licence of the lord to authorize him ſo to do and contrary to the cuſtom of this manor: *Whereupon* the ſaid meſſuage *&c.* became forfeited to the lord. *And they further preſent* that the ſaid demiſe and leaſe, ſo made as aforeſaid, were made by the ſaid *A. B.* to the only end that thereby ſuch forfeiture might incur, and that the lord of this manor, on ſeizure for the ſame, might re-grant the ſaid meſſuage, *&c.* To the uſe of the ſaid *A. B.* and his heirs, (or of *C. D.*, *&c.*) *To the intent* that ſuch eſtate tail might be utterly deſtroyed and docked, and the ſaid *A. B.* and his heirs might become ſeiſed of an eſtate in fee ſimple of and in the ſaid meſſuage, *&c.* at the will of the lord, according to the cuſtom of the ſaid manor; as in ſuch caſes uſed and accuſtomed.

And the ſaid *A. B.* being preſent in Court in his proper perſon, prayed the precept of this Court to be directed to the bailiff of this manor, returnable without delay, command-

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ing the ſaid bailiff to enter into and upon the ſaid meſſuage, &c. and ſeiſe the ſame into the hands of the lord: and the precept was granted.

And afterwards, the ſame court being ſitting, *Iſhmael Cook*, the bailiff of the manor aforeſaid, ſaid that, by virtue of the ſame precept to him directed, he had entered into and upon the ſaid meſſuage, &c. and ſeiſed the ſame into the hands of the lord; as by the ſame precept he was commanded.

Whereupon the ſaid *A. B.* further prayed that the lord of the ſaid manor would re-grant the ſaid meſſuage &c. to him the ſaid *A. B.* and his heirs for ever, by copy of court roll, at the will of the lord, according to the cuſtom of the ſaid manor: *To which prayer* of the ſaid *A. B.* the lord of the manor aforeſaid by his ſaid ſteward conſented, and did, by the ſame ſteward, grant ſeiſin thereof by the rod: *To hold* the ſaid meſſuage, &c. unto him the ſaid *A. B.* and his heirs for ever, at the will of the lord, according &c. by the rents, cuſtoms, &c. *So that* he the ſaid *A. B.* and his heirs might become ſeiſed of a clear eſtate in fee ſimple, at the will of the lord, &c. of and in the ſaid meſſuage, &c. *And* that all eſtates tail before veſted in the ſaid *A. B.* might be utterly and abſolutely barred and for ever extinguiſhed; according to the uſage of the ſaid manor: *And* the ſaid *A. B.* was admitted tenant to all and ſingular the

ſaid premiſes in form aforeſaid; but he paid no fine to the lord; the ſame being on a common aſſurance: and he had aforetime made his fealty."

By ſurrender. A third method of barring an entail of copyholds is by ſurrender.

In the caſe of *Everall* v. *Smalley*, (*n*) it was ſaid by the court that a ſurrender was the cheapeſt, the moſt natural way to bar an eſtate tail: and it was adjudged in that caſe that a cuſtom to bar by ſurrender might be concurrent with a cuſtom to bar by recovery.

And if there be no cuſtom preſcribing the mode of barring ſuch entail, it may be barred by ſurrender though ſuch ſurrender be only to the uſe of a will (*o*).

By grant of the freehold. Again, if a copyholder in tail accept a grant of the freehold of the premiſes held by copy, the copyhold, though entailed, will be extinguiſhed (*p*).

(*n*) 2 *Strange* 1197. 1 *Wilſ.* 26. S. C. 2 *Juſt. Blackſt.* 944. *Doe* d. *Wightwick* v. *Truby & al.* and ſee 2 *Burr.* 969. *Martin* d. *Weſton* v. *Mowlin.*

(*o*) 2 *Veſ.* 596. *Moore* v. *Moore.* *Ibid.* 604. *Carr* d *Dagwell* v. *Singer.* 2 *Vern.* 585. *Otway* v. *Hudſon.* *Ibid.* 702. *White & al.* v. *Thornburgh & al.*

(*p*) 3 *P. Wms.* 9. *Dunn* v. *Green.* 1 *Brown. Ch. Ca.* 515. *Wynne* v. *Cookes.* 2 *Veſ. Jun.* 524. *Challoner* v. *Murhall.* 1 *Vern.* 293. 458. *Parker* v. *Turner.*

So,

So if a perſon be a tenant in tail of a truſt of copyhold, and accept a ſurrender of the legal eſtate from the truſtees, it will bar the entail and remainders over. Of the legal eſtate.

Thus, *John Grayme*, being ſeiſed of certain copyhold premiſes held of the manor of *Accrington* in the county of *Leiceſter*, ſurrendered them to the uſe of *Robert Eltôn* and *Jeffery Taylor* and their heirs to ſuch uſes as he ſhould declare by will, and, on the ſame day, made his will and declared that the truſtees ſhould ſtand ſeiſed of the premiſes, to the uſe (among other uſes) of *John Grayme*, ſon of *Oliver Grayme*, for life, with remainder to the heirs male of his body; with remainder to *Oliver Grayme*, the ſecond ſon of the before named *Oliver*, for life, with remainder to the heirs male of his body, with ſeveral remainders over. *Grayme & Grayme.*

The truſtees were admitted. *John Grayme*, the ſon of *Oliver*, became poſſeſſed as tenant in tail; and died, leaving a ſon *John*, who alſo became poſſeſſed as tenant in tail, when the truſtees ſurrendered the premiſes, to the uſe of the ſaid *John*, the ſon, in fee; who was of conſequence admitted; and afterwards died without heir male, but leaving three daughters.

The plaintiff claimed as heir male of *Oliver* the ſecond ſon of the firſt named *Oliver*, by reaſon of the failure of the iſſue male of *John*.

The defendants were the daughters of *John* the ſon, and claimed under the ſurrender made by the truſtees to the uſe of their father in fee.

And by *Lord Chancellor Apsley*,

"The acceptance of the ſurrender and the admittance under it, is evidence of an intent to acquire a fee; and therefore a bar to the entail in equity."

And the bill was diſmiſſed, but without coſts (*q*).

Entail of a truſt muſt be docked.

But while the equitable entail and the legal eſtate are in ſeveral perſons, ſuch entail muſt be barred by ſome act of the tenant: for though it be but an eſtate in equity it will not be deviſable unleſs the entail be barred (*r*).

Equitable recovery.

It was once held that a deviſe of ſuch an equity in freeholds would be good without any further act to bar the entail (*s*): yet it has been now long determined that a recovery may

(*q*) *Grayme* v. *Grayme* & *Elton*, *in Canc.* Bill filed 22d *June* 1763.

And ſee alſo 2 *Vern.* 583. *Otway* v. *Hudſon* & *al.*

(*r*) See 1 *Hen. Blackſt.* 451. *Roe* d. *Eberall* & *al.* &c. v. *Lowe* & *al.*

(*s*) *Preced. in Chanc.* 228. *Woolnough* v. *Woolnough.*

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be ſuffered of an equity; and that it is as eſſential to dock ſuch equitable entail, as it would be to deſtroy a legal one (*t*). It ſhould ſeem, therefore, that a recovery may be ſuffered, in the manor court, of an equity in copyholds, analogous to that relative to freehold property: and, indeed, that the ſame mode ſhould be adopted for the barring of an equitable as it would be neceſſary to purſue for the purpoſe of deſtroying a legal entail.

Chancery will ſometimes aid in caſe of a truſt entail.

Yet a court of equity will, under certain circumſtances, relieve though the entail has not been properly barred; or decree the truſtees to ſurrender. As, where a perſon, being tenant in tail of the truſt of a copyhold, requeſted the truſtees to ſurrender to him; and on their refuſal to do ſo, brought his bill to compell them; and pending ſuch ſuit, went to the lord's court and deſired to be admitted [permitted] to ſurrender, which was refuſed, becauſe the legal eſtate was in the truſtees; and deviſed his intereſt: it was decreed that the copyholds ſhould paſs by his will; the entail and remainders being conceived as ſufficiently barred (*u*).

(*t*) 1 *Bro. Ch. Ca.* 72. *Boteler* v. *Allington.* and *Salvin* v. *Thornton*, there cited; and ſee 1 *P. Wms.* 91. *Legate* v. *Sewell*, and Mr. *Cox's* Note (2).

(*u*) See 2 *Vern.* 583. *Otway* v. *Hudſon* & *al.*

Preſumption that an eſtate tail has been deſtroyed.

Again, a dormant entail ſhall be *preſumed* to have been cut off, where ſeveral of the iſſue of the original tenant in tail have been admitted as heirs in fee-ſimple (*w*).

COVENANT *to ſurrender* COPYHOLDS, *with Declaration of Truſts, on Marriage*, &c.

THIS INDENTURE of three parts, made, *&c.* BETWEEN *H. W. W.* of, *&c.* and *M.* his wife, of the firſt part; *R. L.* of *&c.* (the father of the ſaid *M.*) of the ſecond part; and *D. B.* of *&c.* and *S. C. P.* of, *&c.* of the third part;

Recital of marriage, *&c.*

WHEREAS a marriage has been lately had and ſolemnized by and between the ſaid *H. W. W.* and *M.* his now wife; and, on the treaty for ſuch marriage, it was agreed between and by the ſaid *H. W. W. M.* his ſaid wife and the ſaid *R. L.* that the ſaid *H. W. W.* ſhould receive with the ſaid *M.* as and for her marriage portion, of the ſaid *R. L.* the ſum of ——, at the time and in the manner hereinafter mentioned: and in conſideration thereof and of the ſaid marriage, and

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(*w*) *Clayton's Rep.* 26. *Wadſworth*'s caſe: and ſee 1 *Hen. Blackſt.* 461. in *Roe* v. *Lowe*, where *Loughborough* C. J. ſaid 'There was no length of poſſeſſion againſt the entail on which to preſume a ſurrender;" which acknowledges that a ſurrender *may* be preſumed.

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in order to ſecure a maintenance for the ſaid *M.* (in caſe ſhe ſhould ſurvive her ſaid huſband) and alſo a proviſion for the iſſue of ſuch marriage (if any ſuch might be) that he the ſaid *H. W. W.* ſhould, at his own charges, ſurrender, limit, and convey, *All*, &c. (*the premiſes*) ſituate, *&c.* and within, and holden of, the manor of *F.* by copy of court roll, of which he is now ſeized in fee at the will of the lord, according to the cuſtom of the ſaid manor, to the uſes, ends, intents and purpoſes hereinafter particularly expreſſed and declared of and concerning the ſame. NOW THIS INDENTURE WITNESSETH, that, in purſuance of the ſaid agreement and in order to effectuate the ſame, and for and in conſideration of the ſaid ſum of —— payable as hereinafter is covenanted and expreſſed, and alſo of 10*s.* by each of them the ſaid *D. B.* and *S. C. P.* *&c.* (the receipt of which ſeveral ſums of 10*s.* is hereby acknowledged) and for divers other good cauſes and conſiderations him hereunto moving, he the ſaid *H. W. W.* for himſelf, his heirs, executors and adminiſtrators, DOTH covenant with the ſaid *D. B.* and *S. C. P.* their heirs and aſſigns, by theſe preſents in manner following, (that is to ſay) that he the ſaid *H. W. W.* ſhall and will at the next general cuſtomary court, or, in the mean time, at ſome ſpecial court to be held for the ſaid manor of *F.* at his own coſts and charges, cauſe himſelf to be admitted tenant to all and ſingular (*the premiſes*) according to the cuſtom of the ſaid manor; and, afterwards at the ſame court, ſurrender the ſaid (*premiſes*)

Parcels.

Covenant by the huſband to get himſelf admitted;

and, on ſuch admiſſion, to ſurrender the ſame premiſes to the uſe of himſelf for life;

(*premiſes*) with the appurtenances, into the hands of the lord of the ſaid manor in due form, *To the uſe and behoof* of him the ſaid *H. W. W.* for and during the term of his natural life; and from and immediately after the determination of that eſtate, *To the uſe and behoof of* them the ſaid *D. B.* and *S. C. P.* their heirs and aſſigns for ever, at the will of the lord according to the cuſtom of the ſaid manor. NEVERTHELESS, as to the eſtate and intereſt of them the ſaid *D. B.* and *S. C. P.* their heirs and aſſigns, of and in the ſaid premiſes, it is hereby declared and agreed by and between all the ſaid parties to theſe preſents, and the true intent and meaning of them and of each of them is, that the ſame are to be ſo ſurrendered and limited to them IN TRUST only, and to and for the ſeveral uſes, end, intents and purpoſes following, (that is to ſay,) *In truſt* that they the ſaid *D. B.* and *S. C. P.* or the ſurvivor of them or the heirs of ſuch ſurvivor, do, immediately on the determination of the eſtate ſo to be granted, ſurrendered, or limited to the ſaid *H. W. W.* poſſeſs themſelves of the ſaid (*premiſes*); and thenceforth, from time to time, receive and take the yearly and other rents, iſſues and profits thereof, and pay the ſame over (after diſcharging all taxes, &c.) (*To the widow for life, in the common form*) *And* from and immediately after the deceaſe of the ſaid *M.* the now wife of the ſaid *H. W. W. Then upon this further truſt* that the ſaid *D. B.* and *S. C. P.* and their heirs ſhall ſtand and be ſeized of the ſaid premiſes IN TRUST

with remainder in fee to truſtees.

Truſts declared.

Truſtees to poſſeſs themſelves of the premiſes on the huſband's death.

And to receive and pay over the profits to widow for life

Then in truſt for the iſſue in tail.

TRUST for the heirs of the body of the ſaid *H. W. W.* (*x*) *on* the body of the ſaid *M.* his now wife, begotten or to be begotten; *And* in default of ſuch iſſue, IN TRUST for him the ſaid *H. W. W.* his heirs and aſſigns for ever. *And* the ſaid *H. W. W.* for himſelf, his heirs, executors, and adminiſtrators, doth hereby further covenant with the ſaid *D. B.* and *S. C. P.* and their heirs, that he the ſaid *H. W. W.* will at the ſaid next court to be held for the ſaid manor of *F.* as aforeſaid, immediately after his ſurrendering the ſaid (*premiſes*) to the uſes hereinbefore expreſſed, cauſe himſelf, at his own proper coſts and charges, to be duly admitted to the ſame; and, on ſuch ſubſequent admiſſion, ſhall and will pay ſuch fine or fines as a perſon admitted tenant to all and ſingular the ſaid (*premiſes*) in fee ſimple, uſually, and of right

With remainder to the huſband in fee.

Covenant by huſband to get himſelf admitted after ſuch ſurrender.

And to pay the fine for the whole fee. See 1 *Vent.* 260. 1 *Mod.* 121. 1 *Burr.* 212. &c. and *poſt. ch.* 7. Of Fines.

(*x*) The *legal* eſtate is here limited to the huſband for life, and the *truſt* (for the ſtatute of uſes does not extend to copyholds) (*y*), is limited to the heirs of *his* body; ſo that the eſtates cannot coaleſce (*z*), and, conſequently the entail is not barrable by the huſband: and, as to the wife, the entail is *not* to the heirs of *her* body, but to thoſe of the huſband's only; and, therefore, ſhe has nothing to do with it. For it ſhould be obſerved that the ſtatute of *Henry* 7th to reſtrain women from alienating the lands entailed *ex proviſione viri*, does not affect copyhold eſtates (*a*).

(*y*) 2 *Veſ.* 257. *Cro. Car.* 44.

(*z*) 1 *Fearne* 68. &c. *Co. Litt.* 26. *b. n.* 3. &c. *Watk. on Deſc.* 160.

(*a*) 2 *Veſ.* 358. *N. Cruiſe on Recoveries*, 158.

ought

ought, and hath been accuſtomed to pay; according to the cuſtom and uſage of the manor of *F.* aforeſaid: So THAT the remainder in fee, of and in the ſaid (*premiſes*) and of every part thereof, may, on ſuch his re-admiſſion, become fixed and veſted in them the ſaid *D. B.* and *S. C. P.* and their heirs; AND SO that they may be well and ſufficiently ſeiſed of the (*premiſes*) according to the cuſtom of the ſaid manor, without being required, or in anywiſe compellable, to be themſelves admitted on the determination of the eſtate for life of the ſaid *H. W. W.* or to pay any fine or fines on their acceſſion to the ſame in poſſeſſion, on the determination of ſuch eſtate. AND ALSO that he the ſaid *H. W. W.* ſhall and will, at ſuch next court, at his own coſts and charges as aforeſaid, cauſe and procure (as far as in him ſhall lie) the declaration of the truſts hereby created, or intended ſo to be, and hereinbefore particularly ſet forth and ſpecified, to be duly and juſtly entered and inſerted on the court rolls of the ſaid manor of *F.* *To the end and intent* that the ſame truſts, and the intention of the ſeveral parties to theſe preſents, may be the more eaſily and effectually aſcertained, evidenced and preſerved. AND ALSO that he the ſaid *H. W. W.* at the time of the execution of theſe preſents, is lawfully and abſolutely (*b*) ſeiſed of

And alſo to have the truſts inſerted in the court rolls. See 1 *Juſt. Blackſt. Rep.* 167. and *poſt.* ch. 5.

Covenant that he is ſeiſed in fee according to the cuſtom;

(*b*) The word *abſolute* is here uſed as contradiſtinguiſhed from *conditional* or *defeaſible*, with reſpect to the eſtate of the

of the ſaid (*premiſes*) to him and his heirs in fee ſimple, at the will of the lord, according to the cuſtom of the ſaid manor of *F.* *And* that he hath full power to ſettle and aſſure the ſame, and every part thereof, in the manner, and to the uſes, ends, intents and purpoſes herein before particularly expreſſed, and according to the true intent and meaning of theſe preſents. *And alſo* that he the ſaid *H. W. W.* and his heirs ſhall and will, at his and their own coſts and charges, on the requeſt of them the ſaid *D. B.* and *S. C. P.* or their heirs, make, do, *&c.* or cauſe *&c.* all and every ſuch further and other acts and deeds as they the ſaid *D. B.* and *S. C. P.* or their heirs, or their counſel learned in the law, ſhall reaſonably adviſe, and require, and he, the ſaid *H. W. W.* or his heirs, as a copyhold tenant, or copyhold tenants, holding of the ſaid manor of *F.* in fee ſimple at the will of the lord, may lawfully and rightfully do *&c.* or cauſe *&c.* for the further better and more effectually ſettling and aſſuring the ſaid (*premiſes*), to the uſes, ends, intents, and purpoſes, hereinbefore particularly ſpecified and declared of and concerning the ſame, and according to the true intent and meaning of theſe preſents and of the parties hereto. *And* the ſaid *R. L.* for himſelf, *&c.* (*Covenant to pay the marriage portion on a day to come.*)

And has power to ſettle the premiſes;

And for further aſſurance.

Covenant by the wife's father to pay the portion.

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the tenant; and not as to the nature of his eſtate with reſpect to the lord; for a copyholder has only a fee-ſimple *ſecundum quid.* (See 4 *Co.* 22. *a.*)

And

And the ſaid *D. B.* and *S. C. P.* for themſelves ſeverally and reſpectively, and for their ſeveral and reſpective heirs and aſſigns, (but not each for the other of them) do hereby covenant with the ſaid *H. W. W.* his heirs and aſſigns, that, on the requeſt, (ſignified in writing to them reſpectively,) and at the coſts and charges of any of the iſſue of the ſaid recited marriage who ſhall become intitled to an equitable eſtate tail under, or by virtue of theſe preſents, of and in the ſaid (*premiſes*) (ſuch iſſue being at the time of ſuch requeſt of the age of twenty one years) or after the fulfilling and ſatisfaction of the truſts hereby created or raiſed, or intended ſo to be, then on the requeſt (ſignified in writing as aforeſaid) and at the coſts and charges of him the ſaid *H. W. W.* his heirs or aſſigns, ſurrender and yield up, according to the cuſtom of the ſaid manor of *F.* the legal eſtate then in them veſted of and in the ſaid (*premiſes*) and every part thereof, To the uſe and behoof of ſuch iſſue his, her, or their heirs and aſſigns; or To the uſe and behoof of him the ſaid *H. W. W.* his heirs and aſſigns (as the caſe may be); or to ſuch perſon or perſons, and for ſuch eſtate or eſtates, uſes, ends, intents, and purpoſes, as ſuch iſſue, or the ſaid *H. W. W.* his heirs or aſſigns reſpectively, ſhall direct or appoint. And laſtly, &c. (*here a clauſe enabling the truſtees to retain their expences* &c. *and not to be anſwerable for each other.*)

Covenant by truſtees to ſurrender the premiſes on the truſts being fulfilled.

Truſtees to retain expences, and not to be anſwerable for each other.

ENTRY *of the* PROCEEDINGS *on the* ROLL.

" AND ALSO at this Court the ſaid homage preſent that ſince the laſt Court, *G. W.* of *&c.* died ſeized of *All* that meſſuage, *&c.* which he held to him and his heirs by copy of court roll, at the will of the lord, according to the cuſtom of this manor; *Whereupon* there happened to the lord for an heriot, one Ox, being the beſt beaſt of which the ſaid *G. W.* died poſſeſſed, and which was ſeized by the beadle of this manor on behalf of the lord. *And* the ſaid homage further preſent that *H. W. W.* is the only ſon and cuſtomary heir of the ſaid *G. W.*

Preſentment of the death of the huſband's father.

Heriot.

Heir.

WHEREUPON proclamation was duly made at the ſame Court, for the ſaid *H. W. W.* to come in and be admitted to the ſaid meſſuage, *&c.* as his right and inheritance, as in ſuch caſes is uſed and accuſtomed within the manor aforeſaid.

Proclamation.

AND UPON SUCH PROCLAMATION BEING MADE, as aforeſaid, came the ſaid *H. W. W.* in his proper perſon, the ſame Court being then ſitting, and prayed to be admitted to the ſaid meſſuage, *&c.* as his right and inheritance: *To whom* the lord of the ſaid manor, by his ſaid ſteward, granted ſeiſin thereof by the rod: *To hold* to him the ſaid *H. W. W.* and his heirs for ever, by copy of court roll, at the will of the lord,

Admiſſion of *H. W. W.* as heir.

lord, according to the cuſtom of the ſaid manor; by the rents, duties, and ſervices, therefore due, and of right accuſtomed. *And* he was admitted tenant thereof in form aforeſaid; gave to the lord for his fine 60*l.* and did to the lord his fealty.

Surrender by *H. W. W.*

AND IMMEDIATELY AFTERWARDS, the ſaid *H. W. W.* ſurrendered into the hands of the lord of the ſaid manor by the rod, and acceptance of the ſaid ſteward, the ſaid meſſuage, *&c.* to which he had at this Court been admitted; and all his eſtate, right, title and intereſt, of, in, and to, the ſame and every part thereof,

To the uſe of himſelf for life;

To the uſe and behoof of him the ſaid *H. W. W.* for and during the term of his natural life; *And* from and immediately after the determination of

with remainder to truſtees in fee.

that eſtate, *To the uſe and behoof* of *D. B.* of *&c.* and *S. C. P.* of, *&c.* their heirs and aſſigns for ever. AND THEREUPON the ſaid *H. W. W.* being preſent in Court in his own proper perſon, prayed to be admitted tenant to all and ſingular the ſaid laſt-mentioned premiſes, according to the form

Admiſſion of *H. W. W.*

and effect of the ſaid ſurrender: *To whom* the lord of the ſaid manor, by his ſaid ſteward, granted ſeiſin thereof by the rod; *To hold* to him the ſaid *H. W. W.* for and during the term of his natural life, with remainder over to the ſaid *D. B.* and *S. C. P.* their heirs and aſſigns, as in the ſaid ſurrender is expreſſed, and according to the form and effect thereof, at the will of the lord, according to the cuſtom of the ſaid manor, by the rents, duties, and ſervices, therefore

fore due and of right accuſtomed: *And* he was admitted tenant thereof, in form aforeſaid; and gave to the lord for a fine 60 *l.* (ſuch fine being aſſeſſed for the whole fee; that is to ſay, as well for the remainder over as for the particular eſtate:) But his fealty was pardoned; he having been aforetime ſworn. Fine.

AND it was, previouſly to the ſaid ſurrender, agreed and declared, by and between the ſaid *H. W. W. D. B.* and *S. C. P.* in and by a certain deed, bearing date, *&c.* and made between the ſaid *H. W. W. &c.* that the ſaid *D. B.* and *S. C. P.* and their heirs ſhould take the eſtate ſo ſurrendered to them IN TRUST ONLY and for the purpoſe in the ſaid deed expreſſed; and that the ſaid *H. W. W.* ſhould, ſo far as in him lay, cauſe ſuch declaration of truſt to be inſerted upon the rolls of this manor, for the better preſerving and evidencing the ſame: NOW THEREFORE, on the prayer of the ſaid *H. W. W.* and with the conſent of the ſaid *D. B.* and *S. C. P.* the ſame is, by the favour of the lord, thus enrolled: Declaration of truſt enrolled.

"NEVERTHELESS, as to the eſtate and intereſt of the ſaid *D B.* and *S. C. P. &c. (Here exemplify the declaration of truſt verbatim.)*

CHAP.

CHAP. V.

Of REMAINDERS, EXECUTORY INTERESTS, *and* TRUSTS.

Limitation of remainders in a ſurrender.

A Perſon, ſeized of an eſtate by copy, may ſurrender it to the uſe of as many perſons, ſucceſſively, by way of remainder, as he pleaſes; ſo that the ſeveral portions of the eſtate ſo limited exceed not his own intereſt in the premiſes: As if he have an eſtate in fee, he may ſurrender to the uſe of *A.* for life, with remainder to *B.* and the heirs of his body, with remainder to *C.* in fee (*c*).

In ſpeaking, therefore, of remainders of copyholds, we ſhall confine ourſelves to thoſe points in which they differ from thoſe of freehold property.

And, *firſtly*, then, as to *Contingent Remainders*.

Contingent remainders; and of the time in which they muſt become veſted.

With reſpect to Contingent Remainders of freeholds, it is a ſettled rule that they muſt veſt during the continuance of the particular eſtate,

(*c*) *Cro. Eliz.* 373. *Stanton* v. *Barnes.* 4 *Co.* 23. *a. Bullock & Dibley*, &c.

or

or *eo inſtanti* that it determine. And the reaſons of this rule were that there muſt have been a tenant in exiſtence to perform the ſervices of the feud, and to anſwer to the *præcipe* of a ſtranger, and alſo, as the remainders were only portions of the ſame eſtate equally with the particular one, and ſo formed together but one and the ſame eſtate, no portion could exiſt when the eſtate of which it was a portion was utterly at an end. But theſe reaſons, it is ſaid, do not immediately apply to copyholds; as the freehold remains in the Lord (*d*).

Yet it ſhould be obſerved, however ſuch obſervation has been ſo frequently ſuffered to eſcape, that we have nothing to do with the *freehold* in theſe caſes; but the ſubject of our enquiry is the *copyhold* intereſt. It matters not, therefore, in whom the freehold is: And it appears rather extraordinary that an eſtate of *freehold* in the lord ſhould be ſuppoſed capable of ſupporting a *copyhold remainder*, ſince they are wholly diſtinct in their nature.

In the caſe of freeholds, there muſt have been a tenant of the freehold againſt whom a *præcipe* might have been brought: But no *præcipe* can be brought of copyhold lands as ſuch. Claims to copyhold intereſts muſt be ſupported againſt

(*d*) See 3 *Atk.* 13. *Lovell* v. *Lovell.* 2 *Vern.* 243. *Mildmay* v. *Hungerford.*

ſtrangers by *plaint*, and againſt the lord by petition. With reſpect to the plaint, one would preſume that the law would be analogous to that of the *præcipe*; and, conſequently, that the rule *would* therefore apply; ſince there ſeems to be the ſame reaſon for an exiſting tenant to the latter as the former: Though, perhaps, the right to ſue by petition, when the premiſes were in the hands of the lord, may be ſuppoſed to do away its neceſſity.

A diſtinction, however, has been ingeniouſly made with reſpect to the deſtruction of contingent remainders of copyhold in the caſes of the death or forfeiture of the particular tenant. Thus, ſays the late *Chief Baron Gilbert* (*e*), If an eſtate be given to a copyholder for life, the remainder to the right heirs of *I. S.* if the tenant for life die, living *I. S.* there it ſeems clear that the remainder is deſtroyed; for it cannot take effect, as by the limitation it ought. But then if tenant for life in that caſe had committed a forfeiture, or made a ſurrender, and then, living tenant for life, *I. S.* had died, it ſeems to be very clear that his right heir might take; for his eſtate in remainder was not to take effect after the determination of the intereſt of tenant for life, but after his death; and when that happened, he was able to take.

(*e*) *Tenures* 265. and ſee 1 *Fearne* 471. and 2 *Veſ. Jun.* 209. 214. 233. *Habergham* v. *Vincent*.

But

But this diſtinction does not ſeem to be anywiſe dependant upon the rule that a contingent remainder muſt veſt during the continuance of the particular eſtate, or *eo inſtanti* that it determine, ſince, in the latter caſe, the eſtate of the heir was permitted to commence long after the particular eſtate was at an end. It could not, therefore, be ſtrictly a *remainder*; for it could not be a portion of an eſtate which had ceaſed to exiſt. It ſhould therefore ſeem that the reaſon of the diſtinction is this; as the lord accepted a ſurrender to the uſe of *A.* for life, and after his life ended; to the heir of *I. S.* he ſhall be compelled to grant the eſtate to the heir of *I. S.* on the death of *A.* in conſequence of his own act. But the eſtate to the heir of *I. S.* was not to commence till the death of *A.* and, therefore, if *A.* determine his own eſtate in his lifetime, the lord muſt enter and enjoy the lands, for this plain reaſon, becauſe there is no one elſe to do ſo. *A.* has forfeited or abandoned his claim, and that of the heir of *I. S.* is not commenced. On the death of *A.* however, the lord muſt regrant to the heir of *I. S.* if an heir of *I. S.* be in exiſtence, (*i. e.* if *I. S.* die before *A.* and leave an heir): but if *I. S.* ſurvive *A.* there would be no one to whom to grant: and in this reſpect is the ulterior eſtate contingent.

It ſhould ſeem therefore that as to a contingent *remainder* of copyholds the rule muſt apply equally as to ſuch remainders of freeholds:

For, on the determination of the particular eſtate, the whole eſtate would be deſtroyed; and conſequently, no *remainder* of that eſtate would exiſt. But in caſe the perſon who was not *in eſſe* come into exiſtence and be capable of taking at the time when the eſtate limited to him was deſignated to commence, the lord ſhall be compellable to grant ſuch eſtate to him, agreeably to his own act: not indeed as a *remainder:* for a remainder cannot exiſt when the eſtate of which it was a portion is no more; for, by all the logic in the world, if the *whole* be deſtroyed and gone, there can be no *part* or *portion* of it remaining.

It appears, indeed, to be acknowledged that the rule applies to copyholds equally as to freeholds with reſpect to the veſting of the remainder during the exiſtence of the particular eſtate, *ſo far as the original limitation is concerned:* for even on the aſſumption that the freehold in the lord *will* preſerve a contingent remainder of copyholds ſo as to prevent its deſtruction by the tenant for life, yet it is confeſſed that it can not ſupport it when the preceding eſtates are expired (*f*).

Admiſſion of a remainder man.

As the particular eſtate and remainders compoſe but one eſtate, the admiſſion of the particular tenant is the admiſſion of thoſe in remainder alſo; and but one fine will be due (*g*).

(*f*) *Gilb. Ten.* 365. 303. 2 *Veſ. Jun.* 214. 233. *Habergham* v. *Vincent.* 1 *Fearne* 471.

(*g*) See *poſt ch.* 6. & 7.

If

If a copyhold be ſurrendered to the uſe of *A.* for life, with remainder over to *B.*; *B*'s eſtate ſhall not come into poſſeſſion 'till *A*'s death, though *A*'s eſtate be determined in his lifetime. The commencement of *B*'s eſtate in poſſeſſion is expreſsly deſignated by the ſurrender, *i. e.* on the death of *A.* in the interim, therefore, between the determination of *A*'s eſtate and the death of *A.* the lord may enter; as no one elſe is entitled (*h*). It is therefore, proper, in limiting, a remainder of copyholds, to limit it expreſsly, To the uſe of *A.* for and during the term of his *natural* life (*i*), and, from and immediately after the determination of that eſtate, by death, forfeiture, or otherwiſe (*k*), To the uſe of, *&c.*"

When a remainder ſhall commence in poſſeſſion.

We come now to the enquiry whether an eſtate can be limited by a ſurrender ſo as to take effect only *in futuro*; and whether a fee can be limited after a fee by ſuch a ſurrender of copyhold premiſes.

That a ſurrender of copyholds is to be conſtrued as a deed at common law, and not as a will, has been already noticed (*l*): And that an

Of a ſurrender to commence in *futuro*.

(*h*) 9 *Co.* 107. *a. Margaret Podger's* caſe. 12 *Mod.* 123. *Head* v. *Tyler.*

(*i*) See *Watk.* No. CXXIII. to *Gilb. Ten.* 454.

(*k*) 3 *Levinz.* 94. *Strode* v. *Denniſon. Sir T. Jones* 189. S. C. under the name of *Benniſon* v. *Strode.*

(*l*) *Ante p.* 99. 108. 110.

eſtate of freehold to commence *in futuro* could not be created by a deed at common law, or a fee be permitted to be limited on a fee by ſuch ſpecies of conveyance, is alſo ſufficiently eſtabliſhed: And it ſhould ſeem, therefore, to follow that a ſurrender cannot be made to commence *in futuro*; and that a fee limited on a fee by ſuch ſurrender would not be good.

Habendum after urrenderor's death.

It has been repeatedly adjudged that if a copyholder in fee ſurrender to the uſe of another, *habendum* after the death of the ſurrenderor, it would be void (*m*).

Fee upon fee.

But whether a fee might be limited after a fee of copyholds, by ſurrender, is a point on which we find leſs certainty in our books.

The reaſoning of the late *Chief Baron Gilbert* on this ſubject is ingenious and forcible; and by giving it in his own words, with the obſervations of Mr. *Fearne* on thoſe of the learned baron, and by following both up with ſome remarks on the authorities referred to by them, will, perhaps, beſt enable us to develope the truth.

Cro. Car. 367. *Cro. Eliz.* 255.

"If a ſurrender, ſays the Chief Baron, be to the uſe of *I. S. Habendum* after the death of the ſurrenderor for life, this is a void ſurrender, being but one entire limitation; but if the ſur-

(*m*) *Cro. Car.* 366. *Seagood* v. *Hone* & *Ux.*

render

render were to him generally, *habendum*, after the death of *I. R. quære* if the *habendum* be void or not? But certain it is, that if the ſurrender be, *habendum* after the death of the ſurrenderor, *ad opus & uſum* of his child then *in ventre ſa mere*, ſuch ſurrender is merely void; for a copyholder cannot ſurrender *habendum* after his death, and ſo reſerve to himſelf a particular eſtate, no more than a freeholder can convey ſo. There was a clauſe in a ſurrender: "and if it happen that the child die before his full age, or day of marriage, then I do ſurrender the ſaid lands to the uſe of my couſin *I. S.* his heirs and aſſigns:" this ſurrender was held to be void as to *I. S.* becauſe the contingency did not happen in the life of the ſurrenderor; and a man cannot ſurrender to take effect after his death; it was not reſolved abſolutely that a fee may be limited upon a fee. *Vide* the book cited in the margin, to explain theſe matters. This caſe, as reported by *Rolle* (as it is ſaid in *Lex Cuſt.* 120.) is an authority that ſuch future uſe is good. This is the ſame caſe as is reported by *Croke*, but directly contrary, and as it ſeems not grounded upon ſo good reaſon as the reſolution in *Croke*; for, as before has been ſhown, ſurrenders are not conſtrued ſo favourably as wills (though *Coke* ſays they ſhould be taken according to the intent of the ſurrenderor); neither is there the ſame reaſon; for a man may as well order a ſurrender in his life time according to the rules of law, as he may any deed to paſs away a freehold eſtate; ſo that the intention of

Cro. Jac. 376. *Cro. Eliz.* 29. 1 *Saund.* 151. 1 *Roll. Rep.* 135. *March* 177.

1 *Roll. Rep.* 109. 138. 253.

Co. Cop. 97.

the party hath not ſo ſtrong an operation in a ſurrender, as in a will; and, therefore, that reaſon will not ſupport a fee upon a fee in that caſe, as it doth in a will, and then it is not at all like an uſe or truſt, in which a fee may be limited upon a fee, becauſe there the legal eſtate was not by any limitation extended further than one entire fee ſimple, which would be to extend an eſtate further than its original creation warranted. But an uſe after an uſe in fee, was but only to give an equitable right to ſomebody to have the profits, as long as the eſtate in fee laſted; which is highly reaſonable, that a man that hath a legal eſtate ſhould diſpoſe of the profits of that eſtate as long as it ſhould laſt; for ſo long had he a right to the profits himſelf, which right he may transfer to others, and there is no harm done to any body; but to extend the legal eſtate would be to keep the lord of the eſcheat eternally out; and it is only allowed in a will, becauſe of the want of counſel to adviſe with how to do it. But an uſe in a ſurrender is not like this uſe; for he that hath an uſe by a ſurrender is to be admitted to the legal eſtate, and is not ſeized to an uſe; and, therefore, if a fee might be limited upon a fee, in ſuch caſes, the legal eſtate would be extended further than its original creation warranted, and a great eſtate be made out of a little one; ſo that it ſeems that a fee upon a fee in copyholds is not good (*n*)." Mr.

(*n*) *Gilb. Ten.* 260. 263.

Fearne

Fearne ſays (*o*), "It appears to have been a queſtion whether limitations of this nature (ſhifting or ſecondary uſes) were good in ſurrenders of copyhold eſtates. Thus, where there was a ſurrender, *habendum* from the death of the ſurrenderor, to the uſe of his child then *in ventre ſa mere* and his heirs and aſſigns for ever, and if the child die before age or marriage, then to the uſe of *I. S.* and his heirs and aſſigns. *Croke* ſays it was reſolved that the ſurrender to the uſe of *I. S.* was void, for that a man could not make ſuch a conditional ſurrender to operate in future. On the other hand, the ſame caſe as reported by *Rolle*, is cited in *Lex Cuſtomaria* as an authority that ſuch further uſes are good, and that a fee may be limited on a fee upon a contingency in copyhold eſtates. And this the caſe in *Rolle's* Abridgment ſeems to leave undecided. But in *Gilbert's Tenures* it is ſaid that ſuch a reſolution ſeems not to be grounded on ſo good reaſon, as the contrary reſolution in *Croke*; for the uſe upon a ſurrender of a copyhold is not like an uſe on truſt at common law: but he who is admitted upon a ſurrender, is admitted to the legal *cuſtomary* eſtate, and is not ſeiſed *to an uſe*, therefore uſes upon ſurrenders are in general governed entirely by the ſame rules as conveyances at common law, in which ſuch limitations were not allowable; and that upon this principle it ſeems a fee upon a fee in caſe of a ſurrender of copyholds is not good,

Sympſon v. *Southern*, *Cro. Jac.* 376.

Lex Cuſt. 121. 1 *Roll. Rep.* 109. 138. 252. 2 *Roll. Abr.* 791. (P) *pl.* 2. (S) *pl.* 8. *Gilb. Ten.* 244.

(*o*) *Conting. Rem.* 416.

any

any more than in a conveyance at common law. But the above opinion of *Gilbert* is, I think, excluded by decided cases; for the validity of conditional limitations in surrenders of copyholds, appears to have been admitted in the above cited case of *Stocker* v. *Edward*, or *Edwards* v. *Hammond*. And the decision in the case of *Sympson* v. *Southern*, may be referred to the point of the *habendum* after the death of the surrenderor being void; taking that as *the conditional future operation*, which was denied to the surrender. And in the case of *Paulter* v. *Cornhill*, *Beaumond*, Justice, conceived the limitation of a fee upon a fee as good in surrenders of copyholds as in uses of lands upon a feoffment.

Vide 1 *Fearne*, p. 173. and vide *Welcock* v. *Hammond*. cited 3 *Co. Rep.* 20. *b.* *Brian* v. *Cawsen* 3 *Leon.* 115.

Cro. Eliz. 361.

So, in the case of a surrender of copyholds, to the intent the lord should admit *A.* whom the surrenderor intended to marry, after marriage; until marriage, to the use of himself and his heirs, and after marriage, to the use of himself and *A.* in tail; the whole Court of *C. B.* held that it was good enough to limit a remainder upon a contingent fee in copyholds, as in case of mortgages of copyholds a surrender *in futuro* is good, for the freehold remains in the lord."

Bently v. *Delamore*, 1 *Freem.* 267, 268. and vide *Calth. Readings*, 31, 32. for the same point. And vide *Taylor* v. *Taylor*, 1 *Atk.* 386.

But as to the case of *Simpson* and *Southwood*, or *Sympson* and *Sothern*, it is very differently reported in the books. As it is reported by *Rolle*

Case of *Simpson & Southwood* examined.

Rolle (*p*), judgment is ſaid to have been given for the party who claimed the ulterior fee. But the report is very obſcure, if not contradictory, in many places. The Court is there ſaid to have been of opinion with *Coke*; but *Coke*'s argument both in *Rolle* and *Bulſtrode* ſeems incompatible with ſuch an opinion.

In *Croke's James* (*q*) the judgment is ſaid to have been given for the party claiming from the heir at law; and ſo it is ſaid in *Godbolt* (*r*), and *Bulſtrode* (*s*).

In *Rolle's Abridgement* (*t*) it is firſt noticed with a "*dubitatur*;" and afterwards, when it is mentioned as adjudged, it is declared that the ulterior fee never aroſe as the contingency did not happen in the life of the ſurrenderor (*u*).

In *Lex Cuſtumaria* (*w*) the ulterior limitation is ſaid to have been good; but the author reſts

(*p*) 1 *Roll. Rep.* 109. 137. 253.
(*q*) *p.* 376.
(*r*) *p.* 264. *Ca.* 364.
(*s*) 2 *Bulſt.* 272.
(*t*) 2 *Roll. Abr.* 791. Uſes. (P) *pl.* 2.
(*u*) 2 *Roll. Abr.* 794. *pl.* 8.
(*w*) *p.* 121. *ch.* 15.

himſelf

himſelf on the ſtatement in 2 *Rolle's Abridgement*, without inſerting the "*dubitatur*"

Indeed, he only tranſlates from that of *Rolle*; and, with *Rolle*, calls the ulterior fee a *Remainder*.

As, therefore, it is only in *Rolle*'s Reports that the judgment of the Court is ſaid to have been given in favour of the perſon claiming the ulterior fee; and as *Croke*, *Godbolt*, *Bulſtrode*, and even *Rolle* himſelf in another work, declare that the judgment was given againſt him; and as the author of *Lex Cuſtumaria* is no authority himſelf, but depends only upon a quotation from *Rolle*, *without* noticing the *dubitatur* inſerted by that writer; this caſe of *Simpſon* and *Southern* ought not, I think, to be regarded as eſtabliſhing the doctrine that a fee may be limited on a fee in a ſurrender of copyholds.

Stocker and *Edwards*.

In the caſe of *Stocker* v. *Edwards*, as reported by *Shower* (*x*), a conditional limitation was ſaid to be good in a ſurrender.

But if the caſe of *Stocker* & *Edwards* be the ſame with *Edwards* & *Hammond* as reported in *Levinz* (*y*), which Mr. *Fearne* appears ſo to

(*x*) 2 *Show.* 398.

(*y*) 3 *Levinz.* 132.

conſider

conſider (z), it is indeed "ſomewhat differently reported" by the latter writer.

In *Shower* the ſurrender was to the uſe of the ſurrenderor for life, and after to the uſe of *John* his youngeſt ſon, *and the heirs of his body*, if he attained to the age of eighteen years; and if he died before he attained to that age *without iſſue male* then to his right heirs: whereas in *Levinz*, the limitation was to the uſe of the ſurrenderor for life, and afterwards to the uſe of his eldeſt ſon and his *heirs*, if he lived to the age of twenty-one years: provided, and upon condition, that if he died before twenty-one that then it ſhould remain to the ſurrenderor and his heirs.

But what puts an end to the application of the caſe in *Levinz* is that in that caſe the ſurrender was to the *uſe of a will*; *though that important circumſtance is omitted in the tranſlation of Levinz*: The words in the French of *Levinz* are that the copyholder ſurrendered "*a ſon volunt, & deviſe al uſe luy meſme pur vie, & apres al uſe ſon eignè Fitz & ſes Heyres, s'il vivra al age de* 21 *anns*; provided *&c.*" as above.

The caſe of *Welcock* & *Hammond*, cited by *Lord Coke* (a), was alſo on a ſurrender to will; *Welcock & Hammond*; *Brien* and *Cawſen*; *Taylor* and *Taylor*.

(z) *Conting. Rem.* 372. in margin.

(a) 3 *Co.* 20. *b.*

as

as was the caſe of *Brian* v. *Cawſen* in *Leonard* (*b*), and alſo that of *Taylor* & *Taylor* in *Atkins* (*c*).

Paulter and *Cornhill.*

In the caſe of *Paulter* v. *Cornhill* (*d*), indeed, *Beaumond*, Juſtice, "conceived a fee limited upon a fee by a ſurrender to be good enough: for," ſaid he, "it ſhall be as an uſe limited upon a feoffment; and theſe uſes ſhall riſe out of the firſt ſurrender."

But as to the point whether a fee might be ſo limited on a fee, it is obſervable that we are informed by the reporter that "the court ſpake not much thereto, but willed to have it ſpecially found."

Bently and *Delamor.*

That of *Bently* v. *Delamor* in 1 *Freeman* (*e*), indeed, ſo far as it goes, countenances the doctrine that a fee may be limited on a fee by ſurrender. But that caſe is very looſely given. And it is there ſaid that a ſurrender *in futuro* is good; and the miſchief [here ſeems an omiſſion in the report] for the freehold remains in the lord." Now the validity of a ſurrender to commence *in futuro* has already been remarked on.

(*b*) 3 *Leon.* 115.
(*c*) 1 *Atk.* 386.
(*d*) *Cro. Eliz.* 361.
(*e*) *p.* 267, 268.

The

The paſſage referred to in *Calthorpe* ſupports the poſition: his words are (*f*) theſe: "If a copyhold be ſurrendered to the uſe of *I. S.* and his heirs, until he ſhall marry *A. G.* and after the ſaid marriage then to the uſe of them two in tail ſpecial, if after they do marry, then is the ſurrender to them in tail, and till then to him in fee." *Calthorpe.*

Upon the whole, therefore, we find that the caſe of *Simpſon* and *Southern* militates againſt, rather than ſupports, the doctrine that a fee may be limited on a fee of copyholds by ſurrender: —that the paſſage in *Lex Cuſtumaria* cannot be a better authority than the book it reſts upon; and, in truth, that the extract it gives is not faithfully given; it being delivered abſolutely, when it was originally accompanied with a *dubitatur*:—that the caſe of *Stocker* and *Edwards* in *Shower* is ſhaken by the report of what Mr. *Fearne* himſelf regarded as the ſame caſe in *Levinz*; and that the caſe in *Levinz* was *on a ſurrender to the uſe of a will*:—that thoſe of *Welcock* and *Hammond*, *Brien* and *Cawſen*, and *Taylor* and *Taylor*, were on ſurrenders to will alſo:—that in the caſe of *Paulter* and *Cornhill* the opinion of *Beaumond* was not acceded to by the Court; but was in itſelf founded upon a principle which, it is preſumed, has been already diſproved; namely, that the limitation

(*f*) *p.* 31-2.

ſhould

ſhould be conſidered as *an uſe* limited on a feoffment:—that the caſe of *Bently and Delamor* is ſo very looſely given, and ſo filled with abſurdity, that if it aſſerts that a ſurrender to commence *in futuro* is good, it might eaſily admit the other poſition; that if it is erroneous in one inſtance it has no great claim to authority in the other:—that the doctrine, therefore, reſts on the ſolitary paſſage in *Calthorpe*:—and that it is apparently inconſiſtent with principles which are indiſputably ſound: we ſhall not, therefore, perhaps, be juſtified in pronouncing that a fee may be limited on a fee by a ſurrender of copyholds, even though ſuch doctrine be advanced by Mr. *Fearne*.

That a fee cannot be limited on a fee by a common law conveyance is not neceſſary to be proved: it is acknowledged. And ſurely if a ſurrender of copyhold lands is to be conſtrued as a common law conveyance, it muſt follow, as an inevitable conſequence, that a fee cannot be limited on a fee by a ſurrender: for if a fee *can* be limited on a fee by a ſurrender, than a ſurrender *cannot* be conſtrued as a conveyance at common law.

And, on the ſame principle, if an eſtate for life or of inheritance cannot be created to commence *in futuro* by a common law conveyance, and a ſurrender of copyholds ought to be conſtrued as ſuch conveyance at common law ought to be conſtrued, than an eſtate for life or

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of inheritance cannot be created to commence *in futuro* by a ſurrender of copyholds. If we acknowledge the premiſes we muſt not deny the concluſion.

The protraction of the legal fee ſo ingeniouſly and forcibly urged by Baron *Gilbert*, is a ſtrong additional argument againſt the doctrine. And, although the freehold of lands held by copy remains in the lord, yet, as the copyholder is to aſſert his right againſt ſtrangers by plaint in the nature of the ſeveral writs at common law in real actions, and as at common law, with reſpect to freeholds, there muſt have been a tenant againſt whom the perſon having right might ſue his *præcipe*, ſo there muſt, with reſpect to copyholds, be a tenant againſt whom to proſecute his plaint (*g*). Hence too does it ſeem inevitably to follow that, by a ſurrender of copyholds, an eſtate for life or of inheritance cannot poſſibly be ſo created to commence *in futuro*.

Add to all this that the inconvenience which may ariſe to individuals by a ſtrict adherence to the rules and principles of the common law in theſe caſes (though the adherence to general rules and principles abundantly compenſates for individual inconvenience,) yet ſuch inconvenience may be eaſily avoided by ſurrendering to

(*g*) See *ante p.* 193-4.

the uſe of a will in the one caſe, and by limiting expreſsly the requiſite particular eſtate to the ſurrenderor in the other.

An executory intereſt may be created by will.

If, indeed, a ſurrender be made to the uſe of *a will*, an executory or future intereſt may be created in copyholds (*h*) equally as in free. The queſtion would then be on the conſtruction of *a will*, and not on the conſtruction of *a ſurrender*.

Of transferring or barring a contingent or executory intereſt.

Our next enquiry is into the modes of transferring or barring a remainder or executory intereſt in copyhold premiſes.

—of veſted remainders.

And as to the transfer of *veſted* remainders we have already ſeen that the remainder-man, being in the ſeiſin, may ſurrender his remainder into the hands of the lord to the uſe of another, equally as if it were an eſtate in poſſeſſion (*i*).

But a perſon having only a contingent remainder or an executory intereſt is not in the ſeiſin; and, conſequently, has nothing which can be the ſubject of a ſurrender. And as it ſeems now to be ſettled that a ſurrender cannot operate

(*h*) See the caſes of *Edwards* & *Hammond*, *Welcock* & *Hammond*, *Brian* & *Cawſen*, and *Taylor* & *Taylor*, before cited. *p.* 204-5.

(*i*) *Ante ch.* 3. Of Surrenders, *p.* 58.

by

by eſtoppel (*k*), it follows that a ſurrender cannot, at law, be a bar to ſuch contingent or executory intereſt. Eſtoppel.

But as a conſequence of this very circumſtance (*i. e.* their not being in the ſeiſin or tenancy,) ſuch contingent or executory intereſt may, it ſhould ſeem, from the very nature of the thing, be transferred or barred by other modes of conveyance, in caſes where the intereſt would be tranſmiſſible or barrable had the eſtate been freehold. For the perſon entitled to the contingent or executory intereſt would not become *tenant to the lord* till it actually fell into poſſeſſion.—Whatever is deſcendible is ſaid to be the ſubject of deviſe (*l*): now if ſuch a contingent or executory intereſt in copyholds be deſcendible, and yet not the ſubject of a ſurrender, it ſurely would follow that it might be deviſed *without* a ſurrender; for otherwiſe a copyhold intereſt would be rendered inalienable in caſes where a freehold intereſt of the ſame nature might be transferred; though no prejudice could accrue to others by reaſon of the alienation. An equity in copyholds is certainly deviſable without the Deviſe, &c.

(*k*) See 2 *Bro. Ch. Ca.* *386. *Compton* & *Collinſon.* 1 *Veſ.* 230. *Taylor* v. *Philips.* 3 *Durnf.* & *Eaſt*, 365. *Goodtitle* v. *Morſe.*

(*l*) See *Dougl.* 717. and the caſe of *Jones & al.* v. *Roe Leſſee of Perry.* 3 *Durnf.* & *Eaſt*, 88.

intervention of a ſurrender (*m*); becauſe the tenancy is not affected by ſuch deviſe: and as ſuch equity could not be ſurrendered, it could not be deviſed at all if it could not be deviſed *without* a ſurrender. An executory intereſt, therefore, of copyholds not being the ſubject of a ſurrender, may ſurely be deviſed if ſuch executory intereſt would have been deviſable had it been of freehold property (*n*).

Releaſe, contract, &c.

Again; it ſhould ſeem that ſuch intereſt may be extinguiſhed by releaſe; or bound in equity by a contract or agreement for a valuable conſideration (*o*).

Of a truſt of copyholds.

Copyholds are equally ſubject to truſts (*p*) as freeholds, but they are not within the ſtatute of uſes (*q*). The perſon having the legal eſtate is tenant to the lord; the truſt, therefore, may be created, modelled, transferred, or deſtroyed, without his concurrence.

(*m*) See *ante ch.* 3. Of a Surrender, *p.* 60. 124.

(*n*) See 1 *Hen. Blackſt.* 341. in *Compton* v. *Collinſon*; where it is ſaid—"The modes of conveying freehold and copyhold eſtates are different, but there is ſurely a fair argument from analogy, that a copyhold eſtate tranſmiſſible under the ſame circumſtances as a freehold, ſhould be governed by the ſame rules."

(*o*) See *Fearne's Executory Deviſes*, 58. &c. 522. &c.

(*p*) See *Aleyn's Rep.* 14. *The King* v. *Holland.* 2 *Veſ.* 631. *Hinton* v. *Hinton.*

(*q*) *Cro. Car.* 44. 2 *Veſ.* 257.

If

If a copyholder enter into an agreement for ſale of his copyhold he ſhall be conſidered as a truſtee for the purchaſer; and ſhall be compelled if living, or his heir if he die, to ſurrender according to the contract (*r*).

And as the cuſtom of the manor can attach only on the legal eſtate, a limitation may ſometimes be made of the truſt which perhaps the cuſtom would not allow of the legal intereſt; thus we have ſeen that an eſtate tail may be created in equity where it might not, perhaps, be permitted at law (*s*).

Declaration of truſt.

If a truſt be thus expreſsly declared it is prudent to have the declaration enrolled in the books of the manor, that it may be preſerved; and in order to avoid fraud. The lord too, by conſenting to the truſt would be bound by it, and not be permitted to claim againſt ſuch his own act (*t*). In ſome inſtances a ſeparate deed will be neceſſary to declare ſuch truſts; as in the caſe of a charity; when the declaration ſhould be by deed inrolled in Chancery purſuant to the ſtatute (*u*). But it is better, if circumſtances will permit, to have the truſts declared in the ſurrender, and ſo entered on the court rolls.

(*r*) 2 *Veſ.* 631. *Hinton* v. *Hinton.*

(*s*) See *ante ch.* 4. Of Entails, *p.* 159.

(*t*) See 1 *Juſt. Blackſt. Rep.* 167.

(*u*) 9 *Geo.* 2. *c.* 36. *ſ.* 1. *Attorney General* v. *Lord Weymouth & al. Lincoln's Inn Hall. Hill.* 16 *Geo.* 2. 1743.

Implication.

But a truſt is frequently implied, or raiſed in equity, when no expreſs declaration is made: as where a copyhold is granted to *A. B.* and *C.* and the whole conſideration money be paid by *A.*, *B.* and *C.* ſhall be regarded as truſtees for *A.* (*w*) though the preſumption of their being ſo may, indeed, like all other preſumptions, be rebutted, even by parol evidence (*x*).

But if the *ceſtui que vie* or perſons having the legal eſtate be the *child* or *children* of the perſon paying the conſideration money, the preſumption will be changed in favour of ſuch child or children for whom the parent was morally obligated to provide, and the purchaſe ſhall be conſidered as an advancement or proviſion for them (*y*): but ſuch obligation cannot extend to a nephew or niece (*z*).

And as the doctrine relative to truſts of this kind appears ſettled on very rational grounds by the caſes of *Dyer* & *Dyer*, and *Goodright* d. *Langfield* v. *Hodges*, (in which the former caſes were fully conſidered), and as they are not yet

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(*w*) Caſe of *Dyer* v. *Dyer. in Scacc. Nov.* 1788. *poſt. p.* 216.

(*x*) Caſe of *Goodright* d. *Langfield* v. *Hodges*, in *B. R.* on a ſpecial verdict, *poſt p.* 227.

(*y*) *Dyer* v. *Dyer.*—And Mr. *Fearne* was of opinion that ſuch preſumption would extend to *natural* children. *Poſthum. Works*, 327.

(*z*) *Goodwright* d. *Langfield* v. *Hodges. poſt. p.* 227.

extant

extant in print they will be given at large at the end of this chapter.

Equity of redemption.

If a copyhold be ſurrendered on condition, by way of mortgage, and the condition be broken, yet the equity of redemption ſhall follow the deſcent of the legal eſtate: thus if the copyhold were in borough Engliſh, the equity would go to the youngeſt ſon; or if it were in gavelkind, to all the ſons equally (*a*).

Reſulting truſt.

And it is the ſame as to reſulting truſts: as in the caſe of an undiſpoſed reſidue; the portion undiſpoſed of ſhall reſult as in freeholds (*b*).

Eſtate *pour autre vie.*

So the truſt of an eſtate *pour autre vie* of copyholds ſhall go to the executors or adminiſtrators, as if it had been of the freehold eſtate (*c*).

But a diſtinction has been made with reſpect to truſts executed and executory: for in the execution of the latter, the Court will be guided by the rules of the common law: as in the caſe of an executory truſt for the heirs of the body of a perſon, in gavelkind lands, the Court will decree an eſtate to the eldeſt ſon and the heirs

(*a*) 2 *Veſ.* 304. *Fawcett* v. *Lowther.* and *ante p.* 120.

(*b*) See *ante p.* 95. Of Surrenders. and ſee *Goodright* d. *Lan field* v. *Hodges. poſt. p.* 227.

(*c*) 2 *Vern.* 264. *Rundle* v. *Rundle,* and the caſe of *Goodright* d. *Langfield* v. *Hodges. poſt.*

of his body, with remainder to the ſecond ſon and the heirs of his body, &c. and not according to the cuſtom of gavelkind (*d*). And ſo alſo in the caſe of borough Engliſh lands; the heir at common law ſhall take the benefit of the executory truſt (*e*).

If a truſt be created of a copyhold, and the truſtee die without heir, ſo that the lands eſcheat, the lord ſhall not be ſubject to the truſt, but ſhall have the lands diſcharged of it (*f*).

(*d*) See 1 *Atk.* 607. *Roberts* v. *Dixwell.*

(*e*) *Starkey* v. *Starkey*, in *Scacc.* cited 7 *Bac. Abr.* Uſes and Truſts, (H) *p.* 179-80. *Gwillim's* Ed.

(*f*) See 1 *Stra.* 454. and 1 *Juſt. Blackſt. Rep.* 166-7. *Burgeſs* v. *Wheate.*

Caſe of DYER *v.* DYER, *in Scacc.*

Before Lord Chief Baron *Eyre*, Baron *Hotham*, and Baron *Thompſon*. *Nov.* 20, 21, and 27. 1788.

IN 1737. certain copyhold premiſes, holden of the manor of *Heyteſbury* in the county of *Wilts*, were granted by the lord according to the cuſtom of that manor, to *Symon Dyer*, (the plaintiff's father, and *Mary* his wife and the defendant *William* (his other ſon), to take in ſucceſſion for their lives and to the longeſt liver of them. The purchaſe money was paid by *Symon Dyer* the father; he ſurvived his wife, and lived

lived until 1785, and then died, having made his will and thereby deviſed all his intereſt in the copyhold premiſes (among others) to the plaintiff, his youngeſt ſon.

The preſent bill ſtated theſe circumſtances and inſiſted that the whole purchaſe money being paid by the father, although by the form of the grant the wife and the defendant had the legal intereſt in the premiſes for their lives, in ſucceſſion, yet, in a Court of Equity, theſe were but truſtees for the father: and the bill, therefore, prayed that the plaintiff, as deviſee of the father, might be quieted in the poſſeſſion of the premiſes during the life of the defendant.

The defendant inſiſted that the inſertion of his name in the grant operated as an advancement to him from his father, to the extent of the legal intereſt thereby given him. And this was the whole queſtion in the caſe.

The *Lord Chief Baron*, after directing the cauſe to ſtand over for a few days, delivered the judgment of the Court as follows.

The queſtion between the parties in this cauſe is, whether the defendant is to be conſidered as a truſtee for his father in reſpect of his ſucceſſion to the legal intereſt of the copyhold premiſes in queſtion? And whether the plaintiff, as repreſentative of the father, is now entitled to the benefit of that truſt. I intimated my opinion

of

of the queſtion on the hearing of the cauſe; and I then, indeed, entertained very little doubt upon the rule of a Court of Equity as applied to this ſubject; but as ſo many caſes have been cited, ſome of which are not in print, we thought it convenient to take an opportunity of looking more fully into them in order that the ground of our deciſion may be put in as clear a light as poſſible; eſpecially in a caſe in which ſo great a difference of opinion ſeems to have prevailed at the bar. And I have met with a caſe in addition to thoſe cited which is that of *Rumbold* v. *Rumbold*, on 20th *April* 1761. The clear reſult of all the caſes, without a ſingle exception, is that the truſt of a legal eſtate, whether freehold, copyhold, or leaſehold; whether taken in the names of the purchaſor and others jointly, or in the names of others without that of the purchaſor; whether in one name or ſeveral; whether jointly or *ſucceſſive*, reſults to the man who advances the purchaſe money. This is a general poſition ſupported by all the caſes; and there is nothing to contradict it; and it goes on a ſtrict analogy to the rule of the common law, that where a feoffment is made, without a conſideration, the uſe reſults to the feoffor. It is the eſtabliſhed doctrine of a Court of Equity that this reſulting truſt may be rebutted by circumſtances in evidence. The caſes go one ſtep further, and prove that the circumſtance of one or more of the nominees being a *child* or *children* of the purchaſor is to operate by rebutting the reſulting truſt; and it has been determined in

Rumbold v. *Rumbold.*

ſo

ſo many caſes that the nominee, being a child, it ſhall have ſuch operation *as a circumſtance of evidence*, that we ſhould be diſturbing land-marks if we ſuffered either of thoſe propoſitions to be called in queſtion, namely, that, ſuch circumſtance ſhall rebut the reſulting truſt, and that it ſhall do ſo as a *circumſtance of evidence*. I think it would have been a more ſimple doctrine, if the children had been conſidered as purchaſors for a valuable conſideration. Natural love and affection raiſed an uſe at common law: ſurely then it will rebut a truſt reſulting to the father. This way of conſidering it would have ſhut out all the circumſtance of evidence which have found their way into many of the caſes, and would have prevented ſome very nice diſtinctions and not very eaſy to be underſtood. Conſidering it as a circumſtance of evidence, there muſt be, of courſe, evidence admitted on the other ſide. Thus it was reſolved into a queſtion of intent; which was getting into a very wide ſea, without very certain guides. In the moſt ſimple caſe of all, which is that of a father purchaſing in the name of his ſon, it is ſaid, that this ſhews that the father *intended* an *advancement*, and *therefore* the reſulting truſt is rebutted; but then a circumſtance is added to this, namely that the ſon happened to be provided for. Then the queſtion is, did the father intend to advance a ſon already provided for? *Lord Nottingham* could not get over this; and he ruled that in ſuch a caſe, the reſulting truſt was not rebutted: And in *Pole* v. *Pole*, in *Veſey*, Pole v. Pole.

Vesey, *Lord Hardwicke* thought so too. As yet the rule in a Court of Equity, as recognized in other cases, is, that the father is the only judge, as to the quantum of a son's provision: and this distinction, therefore, of a son's being provided for or not, is not very solidly taken or uniformly adhered to. It is then said, that, a purchase in the name of a son is a *primâ facie* advancement (and indeed it was difficult to put it in any other way). In some of the cases some circumstances have appeared which go pretty much against that presumption; as where the father has entered and kept possession and taken the rents; or where he has surrendered or devised the estate; or where the son has given receipts in the name of the father. The answer given is that the father took the rents as guardian of his son: now would the Court sustain a bill by the son against the father for these rents? I should think it pretty difficult to succeed in such a bill. As to the surrender and devise it is answered, that these are subsequent acts; whereas the intention of the father in taking the purchase in the son's name must be proved by concomitant acts: yet these are pretty strong acts of ownership, and assert the right, and coincide with the possession and enjoyment. As to the son's giving receipts in the name of the father, it is said that the son, being under age, could not give receipts in any other manner. But, I own, this reasoning does not satisfy me. In the more complicated cases where the life of the son is one of the lives to take in succession,

ſucceſſion, other diſtinctions are taken. If the cuſtom of the manor be that the firſt taker might ſurrender the whole leaſe, that ſhall make the other leſſees truſtees for him: but this cuſtom operates on the legal eſtate, and not on the equitable intereſt; and, therefore, this is not a very ſolid argument. When the leſſees are to take *ſucceſſive*, it is ſaid, that, as the father cannot take the whole in his own name but muſt inſert other names in the leaſe, then the children ſhall be truſtees for the father; and to be ſure, as the circumſtance of a child being the nominee is not *deciſive* the other way, there is a great deal of weight in this obſervation. There may be very many prudential reaſons for putting in the life of a child in preference to that of any other perſon; and if, in that caſe, it is to be collected from circumſtances whether an advancement was meant it will be difficult to find ſuch as will ſupport that idea. To be ſure, taking the eſtate in the name of the child which the father might have taken in his own, affords a ſtrong argument of ſuch an intent; but where the eſtate muſt neceſſarily be taken to lives in ſucceſſion the inference is very different. Theſe are the difficulties which occur from conſidering the purchaſe in the ſon's name as a circumſtance of evidence only. Now if it were once laid down that the ſon was to be taken as a purchaſor for a valuable conſideration, all theſe matters of preſumption would be avoided.

It

Dickinſon v. Shaw.

It muſt be admitted that the caſe of *Dickinſon* v. *Shaw* is a caſe very ſtrong to ſupport the preſent plaintiff's claim. That came on in Chancery on 22d *May* 1770. A copyhold was granted to three lives, to take in ſucceſſion; the father, ſon and daughter. The father paid the fine; there was no cuſtom ſtated. The queſtion was, whether the daughter and her huſband were truſtees during the life of the ſon, who ſurvived the father? At the time of the purchaſe, the ſon was nine, the daughter ſeven years old. It appeared that the father had leaſed the premiſes from three years to three years to the extent of nine years. On this caſe Lords Commiſſioners *Smythe* and *Aſton* were of opinion that, as the father had paid the purchaſe money, the children were truſtees for him. To the note I have of this caſe it is added that this determination was contrary to the general opinion of the bar; and alſo to a caſe of *Taylor* v. *Alſton*, in this Court. In *Dickinſon* v. *Shaw* there was ſome little evidence to aſſiſt the idea of its being a truſt, namely, that of the leaſes made by the father. If that made an ingredient in the determination, then that caſe is not quite in point to the preſent; but I rather think that the meaning of the Court was that the burthen of proof lay on the child; and that the caſes which went the other way were only thoſe in which the eſtate was entirely purchaſed in the name of the children. If ſo, they certainly were not quite correct in that idea; for there had been caſes in which

which the eſtates had been taken in the names of the father and ſon. I have been favoured with a note of *Rumbold* v. *Rumbold*, before Lord Keeper *Henley* on 20th *April* 1761; where a copyhold was taken for three lives in ſucceſſion, the father and two ſons; the father paid the fine; and the cuſtom was that the firſt taker might diſpoſe of the whole eſtate: (and his lordſhip then ſtated the caſe fully.) Now this caſe does not amount to more than an opinion of Lord Keeper *Henley*; but he agreed with me in conſidering a child as a *purchaſer* for good conſideration of an eſtate bought by the father in his name; though a truſt would reſult as againſt a ſtranger. It has been ſuppoſed that the caſe of *Taylor* v. *Alſton* in this Court denied the authority of *Dickinſon* v. *Shaw*. That caſe was held before Lord Chief Baron *Smythe*, *myſelf*, and Mr. Baron *Burland*, and was the caſe of an uncle purchaſing in the names of himſelf and a nephew and niece.—It was decided in favour of the nephew and niece; not under any general idea of their taking as relations, but on the reſult of much parol evidence which was admitted on both ſides; and the equity on the ſide of the nominees was thought to predominate. Lord *Kenyon* was in that cauſe: and his argument went ſolely on the weight of the parol evidence. Indeed, as far as the circumſtance of the firſt takers right to ſurrender, it was a ſtrong caſe in favour of a truſt. However, we determined the other on

Rumbold v. *Rumbold*.

Taylor v. *Alſton*.

the

the parol evidence. That case therefore is not material.

Bedwell v. Froome.

Another case has been mentioned which is not in print, and which was thought to be materially applicable to this: that of *Bedwell* v. *Froome*, before Sir *Thomas Sewell*: but that was materially distinguishable from the present. As far as the general doctrine went, it went against the opinion of the Lords Commissioners. His honor there held that the copyholds were part of the testator's personal estate; for that it was not a purchase in the name of the daughter; she was not to have the legal estate; it was only a contract to add the daughter's life in a new lease to be granted to the father himself. There could be no question; and her being a trustee, it was a freehold in him for his daughters life, but in the cases on the argument his honor stated the common principles as applied to the present case; and, indeed, by saying that, as between father and child, the natural *presumption* was that a provision was meant. The anonymus case in 2 *Freeman* corresponds very much with the doctrine laid down by Sir *Thomas Sewell*; and it observes that an advancement to a child is considered as done for a valuable consideration, not only against the father but against creditors. *Kingdome* v. *Bridges* is a strong case to this point, that is, the valuable nature of the consideration arising as a provision made for a wife or for a child: for there the question was against creditors.

Kingdome v. Bridges.

I do

I do not find that there are in point more than three cases which respect copyholds where the grant is to take *successive*: *Rundle* v. *Rundle* 2 *Vern.* 264. which was a case perfectly clear. *Benger* v. *Drew*, 1 *P. Wms.* 781. where the purchase was partly with the wife's money: and *Smith* v. *Baker*, 1 *Atk.* 385. where the general doctine as applied to strangers was recognized; but the case turned on a question whether the interest was well devised. Therefore, as far as respects the particular case, *Dickinson* v. *Shaw* is the only case quite in point; and there the question is whether that case is to be abided by? With great reverence to the memory of those two judges who decided it, we think that case cannot be followed; that it has not stood the test of time or the opinion of learned men: and Lord *Kenyon* has certainly intimated his opinion against it. On examination of its principles, they seem to rest on too narrow a foundation; namely, that the inference of a provision being intended did not arise because the purchase could not have been taken wholly in the name of the purchaser: this we think is not sufficient to turn the presumption against the child. If it is meant to be a trust, the purchaser must shew that intention by a declaration of trust: and we do not think it right to doubt whether an estate in succession is to be considered as an advancement, when a moiety of an estate in possession certainly would be so. If we were to enter into

Rundle v. *Rundle.*

Benger v. *Drew.*

Smith v. *Baker.*

Dickinson v. *Shaw.*

all the reaſons that might poſſibly influence the mind of the purchaſer, various reaſons might perhaps occur in every caſe upon which it might be argued that an advancement was not intended. And I own it is not a very prudent conduct of a man juſt married to tye up his property for one child, and preclude himſelf from providing for the reſt of his family: but this applies equally in caſe of a purchaſe in the name of a child only: yet that caſe is admitted to be an advancement; indeed, if any thing, the latter caſe is rather the ſtrongeſt; for there it muſt be confined to *one* child only. We think, therefore, that theſe reaſons partake of too great a degree of refinement, and ſhould not prevail againſt a rule of property which is ſo well eſtabliſhed as to become a land-mark, and which, whether right or wrong, ſhould be carried throughout.

This bill muſt, therefore, be diſmiſſed; but after ſtating that, the only caſe in point on the ſubject is againſt our preſent opinion, it certainly will be proper to diſmiſs it *without coſts*.

GOOD-

GOODRIGHT on the Demiſe of LANGFIELD *v.* HODGES.

In the King's Bench on a ſpecial verdict.

THE lord of the manor of *Sutton* in *Somerſetſhire*, by his ſteward, granted the reverſion of an eſtate, held by copy of the ſaid manor, and then in the poſſeſſion of *Elizabeth Baynton*, widow, to her ſon, *William Baynton*, and *Silveſter Langfield*; *To have and to hold* the ſame to them for their lives and the life of the longer liver of them, in ſucceſſion, immediately after the death of *Elizabeth Baynton*.—*William Baynton* paid the fine, and held during his life. Upon his death, *Hodges*, his next of kin and adminiſtrator, entered; upon whom the leſſor of the plaintiff entered.

This cauſe was argued at the county aſſizes before Mr. Juſtice *Aſhhurſt*. On the part of the plaintiff *parol* evidence was offered to prove that it was the leſſee *William Baynton*'s intent at the time of taking the leaſe that after his deceaſe the eſtate ſhould go to *Langfield*. But Mr. Juſtice *Aſhhurſt* objected to the competency of the evidence; and thereupon the jury found their verdict ſubject to the opinion of the Court of King's Bench.

Lord Mansfield delivered the opinion of the Court:

The queſtion is whether it ſhould be deemed a reſulting truſt for *Silveſter Langfield*. This may be divided into two points: Whether the evidence ought to be received; and whether, if received, it is ſufficient to rebut the reſulting truſt.

As to the firſt; it is always preſumed by the Court that whoever pays the fine takes for his own uſe and benefit, and does not mean to ſerve the others, who are mere nominees to give him as large an eſtate as by the rules of the manor he can have, and as his perſonal eſtate is diminiſhed by the payment of the fine-money, his perſonal repreſentative (*c*) is entitled to the advantage reſulting from thence. The caſes are contradictory; perhaps inaccurately reported. But I can remember that in *November* 1752, *A.* having renewed, by adding two new lives who were directed to take in ſucceſſion, they claimed; but the Court decreed it to be a reſulting truſt for his perſonal repreſentative. Otherwiſe in the caſe of a ſon; where the father's renewal is ſuppoſed to be for his advancement (*d*). This diſtinction is not within the ſtatute of frauds, becauſe it ariſes by implication of law. Yet, though it ariſes by implication of law, it may be rebutted; and it is certain that parol evidence may al-

(*c*) *Rundle* v. *Rundle*, *ante p.* 215.

(*d*) *Dyer* v. *Dyer*, *ante p.* 216.

ways

ways rebut an equitable preſumption. See 1 *Vern.* 366. *A.* purchaſed in *B*'s name, and it was admitted by the Maſter of the Rolls that he might be permitted to prove that he purchaſed for his own uſe and benefit, and ſo raiſe a reſulting truſt for himſelf, but that the proofs muſt be ſtrong; which not being the caſe, *A.* was nonſuited. *Secondly*, Here they are as ſtrong as poſſible. It muſt firſt be remarked that *Baynton* had himſelf permitted the legal eſtate to be in his nephew after his death; the parol evidence makes it moſt clear that he did ſo intentionally. The firſt witneſs depoſed that *Baynton* always ſaid that he intended it for *Langfield* after his death, as ſoon as it came to hand; that he would give it to *Langfield*; and that he had purchaſed it for *Langfield*. The ſecond witneſs depoſed, that he ſaid he intended it for *Langfield*; that after Mrs. *Baynton*'s death it was to be *Langfield's*; that ſuch was his conſtant diſcourſe from the time of his purchaſe to the time of his death. The evidence, therefore, is full for the plaintiff, and is admiſſible evidence.

Therefore let the *poſtea* be delivered to the plaintiff:

By *Mansfield*, *Aſton* and *Willes*.

CHAP. VI.

Of ADMISSION.

Introduction.

WE have already ſeen that as the kingdom was divided into manors, ſo each manor was ſubdivided into inferior tenancies. Each tenement was holden of the immediate lord and regarded as his gift. Hence no perſon could be placed in his tenancy without his conſent.

No one could be placed in the tenancy without the conſent of the lord.

The lord took poſſeſſion when the tenancy was vacant.

As the ſeveral tenements were granted in conſideration of certain returns and ſervices, the lord reſumed the poſſeſſion whenever there ceaſed to be a tenant to perform them. On the death of a tenant, therefore, the lands returned to the lord and became the ſubject of a new grant.

In after times, when the grant was extended to the heirs of the tenant, the renewal became a matter of right. But ſtill, on the death of the anceſtor, the lord was entitled to enter and reſume the poſſeſſion. The heir might be at a diſtance, or unable to aſſert his claim. Beſides, it would frequently happen that the ſucceſſion was the object of diſpute. In each caſe the lord was entitled to the poſſeſſion of the lands. If a claimant appeared, the lord had a

Proclamation for the claimant to be admitted.

right

right to be satisfied that his title was legitimate; and that there was an actual tenant to perform the services and to render the returns. If none appeared, none had a right but himself; and as the consideration of his gift had failed, he was justified in resuming the lands.

When a tenant, therefore, died, proclamation was made in the Court of the manor for the heir to make his claim. If he did not appear at the third proclamation (which, according to the feudal law, was to be made within a certain number of days (*h*),) the lord took the possession. If the heir afterwards appeared within the year, the possession was restored to him; if he did not, he lost his feud.

By the laws of *England*, however, the heir of a freeholder was enabled, from very ancient days (*i*), to enter on the lands without this formal process; and only payed his relief to the lord. Which relief, as to the tenant in soccage, was, by a law of *William* the Conqueror (*k*), fixed at a year's rent, and, in fact, seems to have been no more than accounting to the lord for the profits of that year which he might, under cer-

Entry without proclamation.

Relief.

(*h*) See *Wright's Ten.* 197. N. (*k*). *Watk.* N. *C. to Gilb Ten.* 442.

(*i*) *Ll. Hen.* 2. *cap.* 70. See *Seld. Jan. Angl. B.* 2. *c.* 17.

(*k*) *Ll. Gul. cap.* 40. *Seld. Eadm. Spicil. & Kelh. Norm. Dict.*

tain circumſtances, have retained the lands (*l*).

Primer ſeiſin. With reſpect, however, to lands held immediately of the king, the ancient rules were rigouroufly preſerved. The heir could not enter without ſuing his livery. And though ſuch livery was ſued out immediately yet the king was entitled to the year's profits (*m*).

In *Scotland*, to this day, the heir has the ſeiſin given him of whomever he holds (*n*).

Admiſſion of the heir of a copyholder. And, with reſpect to copyholds, the ceremonies of the feudal times muſt yet be obſerved. As the copyholder held only at will, the tenancy muſt neceſſarily have ceaſed on his death: however, if the copyholder has an eſtate to himſelf and his heirs, the lord cannot defeat the claim.

Preſentment of the anceſtor's death. When a copyholder, therefore, dies, his death is preſented by the homage at the next Court; and proclamation is made for the heir to claim. Which preſentment and proclamation are thus recorded:

Entry of preſentment. "ALSO AT THIS COURT the ſaid homage preſented that ſince the laſt Court *A. B.* of *&c.* died

(*l*) See *Watk.* N. I. *to Gilb. Ten.*

(*m*) See 2 *Bl. Com.* 66. *ch.* 5.

(*n*) See *Dalrymp. F. P. c.* 6. *ſ.* 3. *p.* 245. *&c.*

ſeized

ſeized of all that meſſuage, &c. which he held to him and his heirs, by copy of court roll, at the will of the lord, according to the cuſtom of this manor: *Whereupon* there happened to the lord for an heriot, &c. *And the ſaid homage further preſented*, That *B. B.* is the only ſon and cuſtomary heir of the ſaid *A. B.*

—of proclamation where the heir is known.

WHEREUPON proclamation was duly made at the ſame Court, for the ſaid *B. B.* to come in and be admitted to the ſaid meſſuage, &c. as his right and inheritance; as in ſuch caſes is uſed and accuſtomed within the manor aforeſaid."

If the heir be not known, it muſt be ſo preſented; thus,

Preſentment,

"But who is the next heir to the premiſes aforeſaid, is to the ſaid homage not known."

And the proclamation will then run:

and proclamation where the heir is not known.

"For any perſon or perſons having right to the ſaid premiſes, to claim the ſame, and be admitted thereto."

If the heir does not appear on proclamation, his default is recorded:

Default of appearance recorded.

"WHEREUPON the firſt proclamation was duly made at the ſame Court for the ſaid *B. B.* to come in and be admitted, &c. But he came not:

not: Wherefore his default was recorded: and the ſecond proclamation will be made at the next Court."

At the next Court make further proclamation; and enter it,

Further proclamations.

"Alſo at this Court the *ſecond* proclamation was made, *&c.*"

Seiſure.

Quouſque.

If no one comes on the *third* proclamation the lord may ſeize. But unleſs there be a ſpecial cuſtom, he can only ſeize *quouſque* (*o*); or till the claim be made. And even if there be a cuſtom, infants, femes covert, perſons *non compos* or beyond the ſeas, would not be bound (*p*).

Proviſion by ſtatute in caſe of infants and *femes covert.*

But, with reſpect to infants and femes covert entiled by deſcent or by ſurrender to the uſe of a will, it is provided by the ſtatute 9 *Geo.* *c.* 29. that no forfeiture ſhall be incurred by reaſon of their not coming in to be admitted on ſuch proclamations. But that if ſuch femes covert or infants do not come in to be admitted in perſon, or the former by their attornies (which they are thereby empowered to make), or the latter by their guardians, or, having no guardians, by their attornies (which they may

(*o*) *See* 1 *Lev.* 63. *Earl of Saliſbury's* caſe. 3 *Durnf.* & *Eaſt*, 164. *Doe* d. *Tarrant & al.* v. *Hellier & al.*

(*p*) *Gilb. Ten.* 230-1.

appoint

appoint by virtue of that act), at one of the three then next Courts, the lord or ſteward, on due proclamations, &c. may appoint ſuch guardians or attornies for the purpoſe of admiſſion (q).

And, therefore, if one of ſeveral co-heirs of a copyholder be a feme covert at the time of the anceſtor's death, and the lord ſeiſe the whole eſtate (in default of the heirs not coming in to be admitted, after three proclamations,) without firſt appointing an attorney for the feme covert, according to the requiſites of the ſtatute, 9 *Geo. c.* 29. a ſeiſure of the whole eſtate is irregular; though it be not known to the lord that one of the heirs is a feme covert (r).

Heir within the realm at the time of proclamation:

If the heir, who is not otherwiſe privileged, be within the realm at the time of the firſt proclamation made, and then go beyond the ſeas, he ſhall be bound: and, on the other proclamations being duly made, the lord may ſeiſe (s).

at the time of the deſcent.

And it ſhould ſeem that ſuch heir ſhall be bound, on preſentment and proclamations made, if he leave the kingdom after the deſcent and

(q) And ſee *poſt.*

(r) 3 *Durnf. & Eaſt*, 162. *Doe* d. *Tarrant* v. *Hellier.*

(s) 8 *Co.* 100. *b.*

before

before the firſt proclamation; for the point on which theſe caſes turn is, whether, by intendment of law, the heir could have had notice of the deſcent and his obligation to be admitted, or not? And it ſeems that the law will intend that he had knowledge, if he be within the realm at the time of his anceſtor's deceaſe: but if it ſhould be apparent that the heir could not have been informed of ſuch event before his departure, the Court would relieve; as in ſuch caſe the preſumption or intendment of law would be rebutted. And it ſhould ſeem that the Court would be ſatisfied even with ſlight grounds in order to rebut ſuch preſumption; as forfeitures are not to be favoured, and the inclination would be rather for the benefit of the heir at law (*t*).

Proclamation how to be made.

Yet, on proclamation being made for the heir to come in, it is not neceſſary to ſpecify the *particular eſtates* of which the former tenant died ſeiſed, nor, in order to ſeiſe, to prove the proclamations *viva voce* (*u*).

Neceſſary before ſeiſure.

But it is abſolutely neceſſary, in order to warrant the lord in ſeiſing, that proclamation *be* made, on the regular preſentment; for till

(*t*) *Watk.* N. CI. *to Gilb. Ten.* 442.

(*u*) See 1 *Keb.* 287. *Lord Saliſbury's* caſe. and 3 *Durnf. & Eaſt*, 164. N. (*a*).

preſentment

preſentment and proclamation be actually made the heir is not obliged to claim (*w*).

By ſpecial cuſtom proclamation may be made for the ſurrenderee to come in and be admitted; (though, generally ſpeaking, the ſurrenderor continuing tenant till the actual admittance of the *ceſtui que uſe*, the lord, having his tenant, has nothing to do with the ſurrenderee;) and if he come not in, after three proclamations, the lord may ſeiſe. Yet if a copyhold be ſurrendered to a perſon for life, with remainders over; and the particular tenant will not come in, his default ſhall not prejudice the remainder-men (*x*). Proclamation for ſurrenderee to be admitted.

If, on the third proclamation, no one appears to claim the premiſes and demand admiſſion, the lord is juſtified in ſeiſing them, at leaſt *quouſque*: and then a warrant is iſſued to the bailiff of the manor commanding him to enter on behalf of the lord. The entry of the proceedings is thus made on the roll: Warrant to ſeiſe.

"ALSO AT THIS COURT the third proclamation was made, &c. but no one came: THEREFORE a precept was iſſued directed to the ſaid beadle commanding him to enter upon Entry on the roll.

(*w*) 1 *Leon.* 100. *Rumney & Eve.* 3 *Ibid.* 221. *Anderſon & Hayward.* 4 *Ibid.* 30. S. C.

(*x*) See 1 *Roll. Abr.* 568. *Copyh.* (G) *pl.* 5. *Baſpool* v. *Long.*

the

the ſaid premiſes and ſeiſe the ſame into the hands of the lord until ſuch claim ſhall be made and ſuſtained; or "into the hands of the lord," generally; as the caſe may be.

Form of the warrant.

The warrant, or precept, may be thus (*y*):

Manor of Fairhurſt. "You are hereby commanded to enter upon all, &c. of which *A. B.* lately died ſeiſed, and, although due proclamations have been made, are yet unclaimed, and to ſeiſe the ſame into the hands of the lord; and to make your return to this precept without delay."

Given under my hand, &c.
C. D.
Steward, &c.

"To *I. C.* beadle or bailiff of the manor of *Fairhurſt* aforeſaid."

Return.

The bailiff ſhould then endorſe the precept, thus:

"By virtue of the within written precept to me directed, I have entered upon the premiſes within mentioned and ſeiſed the ſame into the

(*y*) But it ſhould ſeem from the caſe of *Trotter* v. *Blake*, (2 *Mod.* 229.) that a *written precept* is not of neceſſity.

hands

hands of the lord, as by the ſaid precept I was commanded."

I. S.
Bailiff, *&c.*"

Then enter the return on the rolls, thus:

"AND now at this Court the ſaid beadle (or bailiff) returned, [or, "came in his proper perſon, and ſaid"] that, by virtue of the precept to him directed, he entered into all, *&c.* and ſeized the ſame into the hands of the lord, as by the ſame precept he was commanded."

Proclamation not made when the perſon to be admitted is in Court.

In the caſes however of grants and ſurrenders, the perſon about to be admitted is generally in Court, either perſonally or by attorney; and, therefore, the formalities of proclamation are avoided, as they are rendered uneſſential. And the entry of admiſſion on a ſurrrender is thus:

Entry of the admiſſion.

"AND the ſaid *C. D.* being preſent in Court in his own proper perſon, prayed to be admitted tenant to all and ſingular the ſaid laſt mentioned premiſes according to the form and effect of the ſaid ſurrender: *To whom* the lord of the ſaid manor, by his ſaid ſteward, granted ſeiſin thereof by the rod: *To hold* to him the ſaid *C. D.* and his heirs for ever, at the will of the lord, according to the cuſtom of the ſaid manor, by the rents, duties, and ſervices therefore due and

and of right accuſtomed. *And* he was admitted tenant thereof in form aforeſaid; gave to the lord for a fine ——; and made his fealty."

Lord compellable to admit.

But, before we conſider the ſeveral eſſentials or formalities of an admiſſion, we muſt remark that, as the lord may compel the heir, and in ſome caſes the ſurrenderee, to be formally admitted; ſo the lord alſo is, in his turn, now compellable to grant admiſſion according to the deſignation of the ſurrenderor.

By bill in equity.

When the lord accepted a ſurrender under confidence to re-grant the copyhold ſo ſurrendered to another perſon, either expreſsly named at the time or to be afterwards named in the tenant's will, the Chancery enforced the truſt as a matter of conſcience, and compelled the lord to admit the ſurrenderee (z).

By *mandamus*.

But a more ſummary and expeditious mode of compulſion is by a *mandamus* at law; which will now lie to compel the admiſſion of the perſon named (*a*).

(z) See *Bro. Ten. p. Copie. pl.* 10. 4 *Co.* 24. *a. Cro. Jac.* 368. *Ford & Hoſkins.* 4 *Burr.* 1961. 2 *Bl. Com.* 366. *ch.* 22.

(*a*) 2 *Durnf. & Eaſt*, 484. *The King v.* The lord of the manor of *Hendon*, &c. 4 *Burr.* 1961.

It

It is ſaid alſo in ſome books, that, if a ſurrender be made and the lord refuſe to admit the ſurrenderee, the ſurrenderor may maintain an action againſt the lord in conſequence of ſuch refuſal (*b*): though it has often been adjudged that ſuch an action could not have been ſupported by the ſurrenderee (*c*). Action.

But when we aſſert that the lord is compellable to admit the ſurrenderee it muſt be underſtood with many qualifications. Though the lord ſhall not be permitted to defeat the right of the ſurrenderor with reſpect to the nomination of his ſucceſſor in the tenancy, yet, on the other hand, the tenant muſt not be permited to prejudice the rights of his lord. Before the tenant can compel an admiſſion, the perſon appointed, and the eſtate he is to take, muſt be ſuch as the ſurrenderor would be warranted in appointing. In what caſes the lord is compellable.

If a copyholder for life, therefore, ſurrender to the uſe of another, for the life of that other, the lord may refuſe to receive ſuch ſurrender: or, as the uſe of the ſurrender is, generally, not declared till the ſurrender is made, he may refuſe to admit the ſurrenderee. The old tenant had an eſtate for *his own* life, and not for the life of another: Tenant for life.

(*b*) *Lex Cuſtum.* 162. *ch.* 17. cites *Gallaway's* caſe, as ſo adjudged: and 3 *Bulſt.* 217. cites S. C.

(*c*) *Gallaway's* caſe, *ubi ſup. Cro. Jac.* 368. *Ford* v. *Hoskins. Moore* 842. S. C.

He could have transferred *that* intereſt, but he could not have obliged the lord to grant an intereſt which might have been of longer continuance; even though a cuſtom were alleged to ſupport it (*d*).

Corporation, &c.

So, if a copyholder in fee ſurrender to the uſe of a corporation, either aggregate or ſole, which is enabled by ſtatute or licence to hold lands, it might well be queſtioned whether an admiſſion could be compelled. For, in the firſt place, it does not indeed appear how a corporation of either kind can be a copyhold or cuſtomary tenant, or diſcharge the ſervices, as ſuit of Court, &c. (*e*). And in the next place, as a corporation is immortal, the fines, in conſequence of death, would be loſt. The lord would ſurely, therefore, be juſtified in refuſing an admittance ſo apparently to his prejudice. In caſes therefore in which the perſons intended to be benefited are incapacitated to hold the premiſes, the premiſes ſhould be ſurrendered to the uſe of a perſon who is not under ſuch incapacity and his heirs in truſt, for ſuch incapacitated perſons (*f*).

Termor.

In the caſe of the Earl of *Bath* againſt *Abney* it was ſaid by the council for the plaintiff, ac-

(*d*) *Watk.* No. CXIX. to *Gilb. Ten.* 451.

(*e*) See *Bro. Fealty. pl.* 15. *Co. Litt.* 66. *b.* 2 *Lord Raym.* 864. *in Tonkin* v. *Croker.*

(*f*) See *ante ch.* 5. *p.* 213.

cording

cording to the report of that caſe in *Burrow* (*f*), that, "though a lord may grant a copyhold for a term of years, yet the lord is not obliged to *admit* for a term of years."

But, though this is merely the aſſertion of the councel at the bar in argument, without being urged on any apparent principle of law or reaſon, and, conſequently, entitled to little credit, yet, as it might poſſibly miſlead, it may be neceſſary to remark that ſuch aſſertion is abſolutely contradictory not only to indiſputable authority but to conſtant uſage (*g*). If a ſurrender be made to the uſe of a perſon for years, or, which is the ſame thing in effect, if a ſurrender be made to the uſe of a will, and the teſtator deviſe to a perſon for years, the lord would moſt certainly be compellable to admit him, equally as if he had taken for life. The nominee or deviſee for years would indiſputably become tenant to the lord as to the portion of copyhold intereſt appointed him. The lord, therefore, might inſiſt upon his coming in to be admitted. And by conſequence, the ſurrenderee for years may inſiſt, in his turn, on an admittance, if refuſed. A termor for years *by licence* could need no admittance, as he would not become tenant *to the lord*.

(*f*) *p.* 217.

(*g*) See 4 *Co.* 23. *a. Co. Copyh. ſ.* 47. *Tr. p.* 110. And ſee the Earl of *Bath* & *Abney*: *Hauchett*'s caſe in *Dyer* 251. *a.* &c. &c. *Batmore* & *Graves*, 1 *Vent.* 260. &c.

Heir at law.

As the admiſſion of an *heir at law* is only for the benefit of the lord, the Court will not grant a *mandamus* to compel ſuch admiſſion, by reaſon of its inutility: as the heir has as good a title without admittance as with it, againſt all the world but the lord (*h*). "It is a matter only between the lord and tenant:" (*i*) and if the lord refuſe admiſſion, he is tenant as to others without it; and the lord ſhall not be ſuffered to take any advantage of his own neglect.

What the heir may do before admiſſion.

On the death of his anceſtor, the heir may enter and take the profits (*k*), and maintain an action for any treſpaſs done to his poſſeſſion (*l*). He may alſo make a leaſe of the copyhold as warranted by cuſtom; and on ſuch leaſe an ejectment may be brought (*m*).

If he die after entry and before admittance, there ſhall be a *poſſeſſio fratris* (*n*); and *his* heir may enter alſo, as he himſelf could have done

(*h*) 2 *Durnf. & Eaſt*, 197. *The King* v. *Rennett.*

(*i*) *Cowp.* 741. *Knight* v. *Bate.*

(*k*) 4 *Co.* 22. *b. Brown's* caſe. *Ibid.* 23. *b. Clarke* & *Pennyfather.*

(*l*) 4 *Co.* 23. *b.*

(*m*) 1 *Leon.* 100. *Rummey* & *Eves. Moore* 596. *Bullock* & *Dibley. Cro. Jac.* 403. *Froſwell* & *Welch.* 3 *Durnf.* & *Eaſt*, 169. and ſee 1 *Roll Abr.* 502. *Copyh.* (M.) *pl.* 1.

(*n*) *Dyer* 291. *pl.* 69. and ſee *Watkins on Deſcents*, 51-2.

(*o*). His

(*o*). His widow ſhall be endowed (*p*); and the huſband of an heireſs ſhall have his courteſy (*q*).

The heir may even ſurrender to the uſe of another on ſatisfying the lord for his fine (*s*); whether the inheritance be in poſſeſſion or only in remainder or reverſion (*t*): and if he would deviſe his intereſt he muſt ſurrender to the uſe of his will (*u*).

If there be a cuſtom to ſurrender into the hands of the tenant, a ſurrender into the hands of the heir before admittance would be good (*w*).

But, though the heir before admittance may maintain an action in the common law Courts,

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(*o*) 4 *Co.* 23. *b.* *Clarke* & *Pennyfather.*

(*p*) See *Gilb. Ten.* 287-8. and *Watkins on Deſcents*, 53-4. *in Not:* and the books there cited.

(*q*) See *Gilb.* & *Watk. on Deſc. ubi. ſup.* and the books there cited.

(*s*) 4 *Co.* 22. *b.* *Brown's* caſe, and *ante p.* 59. 102. and ſee *Dalrymple, F. P. ch.* 6. *ſ.* 3. *p.* 252-3. 1 *Anſtruther* 13. *Morſe* v. *Faulkener & al.*

(*t*) *Cro. Jac.* 31. *Auncelme* v. *Auncelme.* *Cro. Eliz.* 662. *Colchin* v. *Colchin.* 1 *Roll. Abr. Copyh.* (E) *pl.* 1. S. C.

(*u*) *Strange*, 487. *Smith* & *Triggs*, and *ante p.* 102.

(*w*) See 1 *Keb.* 25. *Muniface* and *Baker*, and *ante p.* 78.

as an action of treſpaſs or ejectment, yet he cannot ſue in the Court of the manor: and therefore, he ſhall not have a plaint in the nature of an aſſize (*x*). So he cannot ſit on the homage (*y*): though it is ſaid that the lord may avow upon him before he be admitted (*z*). But it ſhould ſeem that this can only be where the delay of admiſſion is occaſioned by the heir; as if the lord make proclamation for him to come in and be admitted, and the heir does not do ſo before the third proclamation be made: here the law perhaps, would permit the lord to avow on him by reaſon of the length of time now uſual between the death of the anceſtor and the third proclamation, as Courts, at this day, are ſo ſeldom held; and the lord manifeſts his intention to admit him when he ſhall come and requeſt it. But if the delay be occaſioned by the lord, the avowing on the heir for rents or ſervices would, I conceive, be tantamount to an admiſſion in itſelf; as it would certainly be acknowledging him as tenant. In

(*x*) *Co. Copyh. ſ.* 41. *Tr.* 94. *Gilb. Ten.* 287. *Kitch.* 60. *a.* and *b.*

(*y*) *Kitch.* 87. *b. Co. Copyh. ſ.* 41. *Tr.* 94. But it ſhould ſeem that the ſwearing of the heir on the homage, being a ſolemn act in court in the preſence of the lord or ſteward, would be tantamount to a poſitive admittance. See *Watk. Gilb.* 287. N. (*y*). and ſee alſo 4 *Burr.* 1955. in *Roe* d. *Noden* v. *Griffiths & al.* Arg.

(*z*) *Kitch. & Co. Copyh. ubi ſup. Sed vide Moore* 272. Alderman *Dixey's* caſe cited there, and *poſt. p.* 247.

the

the former caſe, the law would not perhaps ſuffer the heir to avail himſelf of the avowal as an admittance, when it was the effect of his own neglect or refuſal: yet, even in that caſe, there would be field for doubt, as the lord might have held his Court oftener if he pleaſed (*a*).

Other perſon taking by act of law.

Wherever any becomes entitled to the copyhold by act of law, as an executor (*b*); a widow taking freebench, in caſes in which no aſſignment is requiſite (*c*); an huſband in right of marriage (*d*), or by the curteſy (*e*); ſuch perſon may enter *&c.* as an heir at law might have done.

And the true diſtinction with reſpect to the heir or other perſon ſo taking by act of law ſeems to be, as noticed by *Fenner* in the caſe of *Ever* and *Aſton* (*f*), that, before admittance, the lord himſelf can not claim any duty or ſervice, as fealty, homage, relief, rent, or ſuit; but that

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(*a*) *Watk.* N. CXXXV. to *Gilb. Ten.* 459.

(*b*) See *Dyer* 251. *Hauchett's* caſe.

(*c*) See *Watk.* on *Deſc.* 53-4. notes. *Gilb. Ten.* 287-8. and notes; and *Watk.* N. XXV. to *Gilb.* 373.

(*d*) *Hauchett's* caſe, *ubi ſup. Co. Copyh. ſ.* 56. *Tr. p.* 129. *Gilb. Ten.* 291. and *Watk.* N. CXXXIX. *p.* 461.

(*e*) See *Watk.* on *Deſc.* 53-4, notes; and the books there cited.

(*f*) *Moore.* 272. This diſtinction was ſaid to have been taken in the caſe of Alderman *Dixey & al.* 23 *Eliz.* in *C. B.*

this delay of admiſſion ſhall not prejudice a third perſon. If the lord accept fealty, &c. from the heir, &c. it would be an implied admittance; but whether the heir, &c has been admitted or not is relative only to the lord, and into which ſtrangers have no neceſſity to enquire (*g*).

Surrenderee.

But with reſpect to a ſurrenderee, who takes by the act of the party, the matter is wholly different. *He* is not tenant to any purpoſe before admiſſion: he cannot even enter on the premiſes. The ſurrenderor continues tenant to the lord.—But we have already ſpoken on this ſubject in the chapter on ſurrenders (*h*).

Having thus ſeen what may, and what may not be done, before admittance, we come now to the conſideration of the admittance itſelf.

Admittance defined.

"An admittance," therefore, "is the lord's acceptance of a perſon into the tenancy."

It is the acceptance of a tenant.

And, firſt, it is an acceptance by "*the lord*:" for as we have already obſerved, a perſon could not be put into the tenancy without his conſent: (*i*) a copyholder, eſpecially, who once actually held, and is ſtill regarded as holding, his tene-

(*g*) See *ante p.* 244.

(*h*) *Ante p.* 100, &c.

(*i*) *Ante p.* 230. and ſee *Watk. Introd. on the Feudal Syſt. Pref.* to *Gilb. Ten.* and notes.

ment

ment at the will of the lord, could not, by the terms, become the lord's tenant independently of that will. The will of the lord is now, indeed, dwindled into form; but, as a form, it is ſtill indiſpenſible.

Yet the acceptance need not be a perſonal acceptance by the lord; the lord may accept him by his ſteward, or by the deputy of his ſteward.

Need not be *coram paribus.*

But the admiſſion of a copyholder differed eſſentially in one point from the ancient admiſſion of a free tenant: For admiſſion was once equally requiſite with reſpect to the latter as the former. The free tenant could only have been admitted in the preſence of, and with the conſent, of his peers. Each frank-tenant, as *Weſt* remarks (*k*), had originally a negative on every perſon who was propoſed by the lord to be admitted. But this did not hold as to copyhold tenants. The copyholder, if not properly a villein, was removed but little from that order of men, and was, at leaſt, but a tenant ſtrictly at will: he was not to be judged by his fellow tenants, as the freeholder was; the lord or his ſteward was the judge of his Court; or if he was ameſnable to a ſuperior one he was to be tried by freemen; as copyholders could not form a jury at common law. The preſentment of his fellows was not eſſential to give power to the lord to reſume his tenement; he might

(*k*) *On the creation of Peers*, 63.

have

have ſeiſed it at his pleaſure whenever he choſe to permit him no longer to hold. From hence then it muſt appear that the ſame reaſons did not apply to the copyhold tenant as did to the free, with reſpect to the admiſſion of a new perſon into the tenancy. Hence the lord or his ſteward, may admit as well out of Court as in; ſince the approbation, or even the teſtimony, of the former tenants is not requiſite. It were, indeed moſt egregiouſly abſurd to ſuppoſe the concurrence of others to be neceſſary, where the eſtates, equally of themſelves as of the perſon about to be admitted, were abſolutely dependant upon the will of the lord, not only as to their origin, but alſo as to their duration and extent.

But ſhould be notified at the next Court.

The admiſſion, however, of the new tenant out of Court ſhould regularly be notified by the lord or his ſteward, at the next Court-day for the information of the tenants. This too was more immediately neceſſary in ancient days; as, in caſe the tenants ſhould have known any objections to the perſon ſo admitted, of which the lord might have been ignorant, they might have informed him of them, from which he might have been induced to reſume the eſtate, as having conferred it on a perſon who was unworthy of the grant. Add to this, that it muſt be regularly inſerted on the Court rolls of the manor; by a copy of which he is to hold (*l*).

(*l*) *Watk.* N. CXI. to *Gilb. Ten.* 448-9.

If

If the admittance be by the lord or ſteward out of Court a memorandum of ſuch admittance ſhould be made to the following effect: *Memorandum of an admittance made out of Court.*

Manor of Fairhurſt. } "BE IT REMEMBERED that, on this the——day of—— 17——*&c.* *W. H.* of *&c.* came, in his proper perſon, before me *E. M.* lord (or "ſteward," *as the caſe may be*) of the manor of *Fairhurſt* aforeſaid, and prayed to be admitted to all, *&c.* *To whom* I, the ſaid *E. M.* as lord of the ſaid manor perſonally granted ſeiſin thereof by the rod: (or "To WHOM the lord of the ſaid manor by me his ſaid ſteward, granted, &c.") TO HOLD to him the ſaid *W. H.* and his heirs for ever, by copy of Court roll, at the will of the lord or lords for the time being, (*or if the admittance be by the ſteward ſay in the common form*, "at the will of the lord") according to the cuſtom of the ſaid manor; by the rents, duties, *&c.* *And* he was admitted tenant thereof ("by me the ſaid lord") in form aforeſaid; and gave for his fine——: but his fealty was reſpited."

E. M.
Lord (or ſteward) *&c.*

At the next Court this memorandum ſhould be produced, and enrolled:

"ALSO AT THIS COURT it was certified by the ſaid ſteward that, out of Court, and ſince the laſt Court, *W. H.* of *&c.* was admitted by the *Entry on the rolls.*

the perſonal acceptance of the lord of this manor, (*or* "of him the ſaid ſteward") to all &c. (which ſaid premiſes had been before duly ſurrendered to the uſe of the ſaid *W. H.* &c.) (*or* "had deſcended to him the ſaid *W. H.* as the cuſtomary heir of &c.") Of which admittance a memorandum was made, and ſigned by the ſaid lord, (or "ſteward") and now produced and read in Court, in the words following, that is to ſay;

Manor of Fairhurſt. } BE IT REMEMBERED, &c.

Admiſſion out of Court, and by whom it may be.

As the preſence therefore of the tenants is not neceſſary on the admiſſion of a copyholder, the lord (*m*), or ſteward (*n*), may admit out of Court as well as in.

It is ſaid, indeed, (*o*) that an under-ſteward cannot admit out of Court: but it is repeatedly laid down in our books (*p*) that a deputy may, when properly conſtituted, "do any act which his principal might have done; and that leſs power he cannot have (*q*)." There does not ap-

(*m*) 4 *Co.* 26. *b.*

(*n*) *Kitch.* 82. *b.* 1 *Roll. Abr.* 505. *Copyh.* (V) *pl.* 4.

(*o*) *Bro. Court. Bar. pl.* 22. *Ten. per. Copie. pl.* 26. *Co. Copyh. f.* 46. *p.* 107. *Kitch.* 82. *b.*

(*p*) 1 *Lord Raym.* 659. *Parker & Kett.* 1 *Salk.* 95. S. C.

(*q*) See 1 *Lord Raym. & Salk. ubi. ſup.*

pear

pear any good reaſon then, why there ſhould be a particular exception with reſpect to *admitting* a copyholder (*r*), as it is merely a miniſterial act.

Out of the manor.

Now wherever an admiſſion would be good out of Court, it ſeems to follow, as a neceſſary conſequence, that ſuch admiſſion would be good out of the manor *(s)*. And it is acknowleged that the lord himſelf may admit out of the manor (*t*): and though it is ſaid that a ſteward cannot do ſo; yet moſt of the caſes evidently ſuppoſe ſuch admiſſion to have been at *a Court* held out of the manor *(u)*. Now it is clear that *a Court* cannot be held out of the manor unleſs it be by ſpecial cuſtom, as where a Court is held in one manor for a whole honour in which there are ſeveral manors *(x)*; and, therefore, this reaſoning does not apply to *an admittance*, merely as an admittance, as an admittance may, moſt certainly, be *out of* Court. And as to the caſe of *Tukely* v. *Hawkins* (*y*), ſo far as it relates to this point, it ſeems to be completely anſwered by the reaſoning in that of *Dudfield*

(*r*) See *Co. Copyh. f.* 46. *Tr. p.* 107.

(*s*) See 1 *Salk.* 184. *Dudfield* & *Andrews*, and *Watk.* No CXI. to *Gilb. Ten.* 448.

(*t*) 4 *Co.* 26. *b. Melwich's* caſe.

(*u*) 4 *Co.* 26. *b.* 27. *a. Clifton* v. *Molineaux.*

(*x*) *Cro. Car.* 367. *Seagood* v. *Hone. Co. Litt.* 58. *a.*

(*y*) 1 *Lord Raym.* 76.

v. *Andrews*,

v. *Andrews* (z), which appears to apply as ſtrongly to an admiſſion as to a ſurrender.

Who may admit.

We will now proceed to enquire—Who may be ſuch lord, ſteward, or under-ſteward, as may admit a copyholder?

Lord.

And here a diſtinction is frequently made, with reſpect to the lord, between an admiſſion on a grant and on a deſcent or ſurrender. But, in the firſt inſtance, the incapacity goes rather to the power of *granting* than of *admitting*: For if the lord has power to grant, he certainly has power to admit. If the grant be invalid, the admiſſion on ſuch grant would be of no avail. Beſides; admiſſion is generally made at the time of the grant by the lord who grants; and if it be not actually and formally made the grant itſelf would be ſufficient to warrant the grantee to enter; as the very act of making the grant neceſſarily ſuppoſes the acceptance of him as a tenant.

In the caſe of deſcents and ſurrenders, the lord, the ſteward, or under-ſteward, are merely inſtruments: They are compellable to admit if oſtenſibly ſuch; and the tenant is not to enquire into the legality of their title.

(z) 1 *Salk.* 184.

If

If a perſon therefore be lord *de facto* it is enough: For whether he be lord by right or by wrong, as a diſſeiſor, &c. (*a*); whether he be ſeiſed in his own right, or in the right of another (*b*); whether he have an abſolute or defeaſible (*c*) title; whether he be tenant in fee, in tail (*d*), for life, years, at will, or by ſufferance (*e*); whether he be an infant, or of full age, &c. (*f*) it matters not: His admittances being, in theſe caſes, only miniſterial, they will be good, and obligatory on his ſucceſſors or thoſe having right. Lord *de facto*.

So the law is not very curious in examining the imperfections of the ſtewards perſon, nor the unlawfulneſs of his authority; for be he an infant, or *non compos mentis*, an ideot, or lunatick, an outlaw, or an excommunicate, yet what things ſoever he performs as incident to his place, can never be avoided for any ſuch diſability, becauſe he performs them as a judge, or at leaſt as cuſtom's inſtrument; and for his authority, though it prove but counterfeit if it come to exact trial, yet if in appearance or outward ſhew it ſeems currant, that is ſuffici- Steward.

(*a*) *Co. Litt.* 58. *b.* 1 *Co.* 140. *b.* 4 *Co.* 23. *b.* 24. *a.*

(*b*) See of a Guardian, *Co. Litt.* & 4 *Co. ubi ſupra.*

(*c*) *Co. Litt.* 58. *b.* 4 *Co.* 23. *b.* 24. *a.*

(*d*) 4 *Co.* 23. *b.*

(*e*) 4 *Co.* 23. *b.* 24. *a.* *Co. Litt.* 58. *b.*

(*f*) 4 *Co.* 23. *b.*

ent.

ent. As if I grant the ſtewardſhip of my manor of *Dale* by patent, and in the patentee's abſence a ſtranger by my appointment keeps Court, this is authentic. If a grant of a ſtewardſhip be made to one, and for ſome fault or defect in the grant it is avoidable, yet Courts kept by him before the avoidance ſhall ſtand in force; and whatſoever he did, as ſteward, is ever unavoidable (*g*).

If ſuch ſteward be appointed by parol only, his admiſſions will be equally valid as if he had been appointed by an inſtrument however ſolemn; and even though his appointment be avoided for ſuch cauſe: As if he be appointed by parol by a corporation; though a corporation cannot conſtitute ſuch officer without writing: And ſo alſo if the ſteward be retained by parol by the king's auditor or receiver (*h*).

Under ſteward, &c. So an under ſteward may be appointed by parol (*i*): And ſuch deputy may act either in his own name or in the name of his principal (*k*).

(*g*) *Co. Copyh. f.* 45. *Tr. p.* 104-5.

(*h*) *Ibid. f.* 45. and ſee *Moore*, 112.

(*i*) *Ibid. f.* 46.

(*k*) 1 *Lord Raym.* 658. *Parker & Kett.* 1 *Salk.* 95. S. C.

So,

So, an underſteward may authorize another to do a particular act, as to keep a Court (*l*). And even if a perſon was not expreſsly authorized to do a particular act only, but appointed an under-deputy generally and ſo the appointment be abſolutely invalid, and, conſequently, ſuch perſon have no true or legal authority at all, yet his admittance would be good (*m*).

So if a chief ſteward make a deputy and die, though the deputation would neceſſarily be at an end, ſince a derivative power cannot exiſt when its ſource has ceaſed, yet the admiſſions made by the deputy after the death of his principal would be equally valid as if made in his life time (*n*).

But if a ſtranger, without the appointment of the lord, or conſent of the right ſteward, or without any colour of authority, will, of his own head, come into a manor and keep a Court, it ſeems that a performance of any judicial duty, or the executing of any act whatſoever, will not be warranted, eſpecially if the Court be kept without warning given to the bailiff by precept, according to the cuſtom (*o*).

(*l*) 1 *Leon.* 288. *Lord Dacre's* caſe. 1 *Lord Raym.* 661-2.

(*m*) See *Parker & Kett.* 1 *Lord Raym.* 1 *Salk. Comyns's Rep.*

(*n*) *Moore*, 112.

(*o*) *Co. Copyh. ſ.* 44. *Tr. p.* 105.

Admittance by attorney.

And as the lord is not obliged to admit the tenant in his own perſon, ſo it is not neceſſary that the tenant be *perſonally* admitted. The lord, if he pleaſes, may admit him by attorney (*p*). Though it is ſaid that he is not *compellable* to admit him by attorney; as a perſon cannot ſwear his fealty by another (*q*). In the caſe of femes covert and infants taking by deſcent or ſurrender to a laſt will he is now compellable to admit them by attorney in certain caſes, by ſtatute (*r*). And, as it is now become uſual to reſpite or pardon fealty, ſuch fealty being now merely formal, it ſhould ſeem that the Courts would compel him, under certain circumſtances, in other caſes to admit by attorney and to reſpite or waive his fealty: as in caſes of ſickneſs, &c. when the heir, &c. could not come in perſon: or at leaſt prevent a forfeiture from incurring. Thus, where a quaker refuſed to take the oath of fealty, the Court relieved (*s*).

Secondly, an admittance is "*the acceptance* of a perſon as tenant."

Admiſſion, how to be made.

We ſhall, therefore, proceed to enquire how ſuch acceptance is manifeſted; and what ſhall amount to ſuch acceptance.

(*p*) 9 *Co.* 76. *a.* in *Coombe's* caſe.

(*q*) *Ibid.*

(*r*) 9 *Geo. cap.* 29.

(*s*) *Preced. in Chanc.* 574. *Edmore* v. *Graven.*

And

And firſt of an expreſs and formal admittance. Expreſs.

And this may be in or out of Court. When a grant is made to a perſon, the very execution and delivery of that grant to him is, in itſelf, an acceptance of him as a tenant, from the very nature of the thing: the giving him the rod or accuſtomed ſymbol is the inveſting him with the *poſſeſſion of the tenements*, and not the acceptance of his perſon. Grantee.

When a copyholder ſurrenders into the hands of the lord or ſteward, the ſurrenderee is expreſsly received into the tenancy by the lord or ſteward ſaying to him "I, as lord of this manor," (*or* "I, as ſteward of this manor, do, for, and in the name of, the lord,") admit you, *A. B.* as tenant to all that, *&c.* which have been now ſurrendered into my hands, by *C. D.* to your uſe: TO HOLD to you and your heirs, by copy of Court roll, at the will of the lord, according to the cuſtom of this manor, by the rents, duties, and ſervices, therefore due and of right accuſtomed; and according to the form and effect of the ſaid ſurrender: And do put you, into the ſeiſin of the ſame premiſes by the delivery of this rod." Surrenderee. Manner of admitting.

The new tenant then receives the rod, or other ſymbol of poſſeſſion; and pays his fine; and is ſworn to fealty, unleſs his fealty be pardoned or reſpited. Seiſin and Fealty.

Entry on the roll.

The proceedings are thus entered on the roll:

"AND the ſaid *C. D.* being preſent in Court in his own proper perſon, prayed to be admitted tenant to all and ſingular the ſaid premiſes ſo ſurrendered to his uſe and according to the form and effect of the ſaid ſurrender: TO WHOM the lord of the ſaid manor perſonally, (*or* "by his ſaid ſteward,") granted ſeiſin thereof by the rod: TO HOLD to him the ſaid *C. D.* and his heirs for ever, at the will of the lord, according to the cuſtom of the ſaid manor, by the rents, duties, and ſervices therefore due and of right accuſtomed. And he was admitted tenant thereof, in form aforeſaid, and gave to the lord for a fine ——; and did his fealty."

Livery of ſeiſin; by the rod or verge.

On being admitted tenant the perſon ſo admitted is put into the ſeiſin or poſſeſſion of the premiſes. This is done by a ſymbolical livery; moſt uſually by a rod, wand, or verge; hence are copyholders frequently denominated "tenants by the verge (*t*)."

Proper and improper inveſtiture.

A ſymbolical livery became, from its convenience, adopted at a very early period. Hence the proper and improper inveſtiture of ancient days. The immediate tenants of the king who held *per baroniam*, were uſually *enrobed* before their peers on the occaſion. In early times the

(*t*) See *Litt. ſ.* 78. and *Co. Litt.* 61. *a.*

tenant

tenant was obligated to aſſiſt his lord with his councel. The tenants *in capite* formed the Court baron of the realm. The dignity of the peerage was attached to their territories; and the tenant received the inſignia of his order on receiving the grant of his lands. It was tantamount to the proper ſeiſin as to the fixture of property; it was of equal publicity to his peers; and it ſupplanted it. And from this circumſtance of *enrobing* or *inveſting* the tenant, came the term of *inveſtiture*.

Arbitrary ſymbols.

In other caſes, the ſymbol was generally arbitrary; and often of the moſt extravagant nature: a ſword, a lance, a knife, a glove, the key of a church, and even a drinking cup, or a lock of the grantor's hair, was adopted as the ſymbol of poſſeſſion. The rod, ſtaff, or verge, however, was the moſt common; and which moſt probably was no other than that borne by the officer of the Court, and conſequently, always at hand: though its origin, indeed, has been deduced from a more ancient and ſacred ſource (*u*).

Coram paribus.

The livery of ſeiſin by ſymbol in full Court was frequent in ancient times on the grant of freehold property. We have already noticed it as to the tenants *in capite*: and it was equally uſual on the grants of inferior lords (*w*).

(*u*) See *Stuart's View of Soc. in Eur. B.* 1. *c.* 2. *ſ.* 4. *p.* 289. Quarto edition.

(*w*) See *Diſſ. Pref. Mad. Formulare Angl. ſ.* 13.

The uſual ſymbol ſhould be obſerved.

When a particular ſymbol has been immemorially uſed in a manor it has been urged that a ſurrender by another ſymbol would not be valid. Thus a cuſtom was ſet up to ſurrender by the *verge*; and a ſurrender was alleged as being made by the delivery of a *knife*: and the council of the marches of *Wales* proceeding to try the cuſtom, a prohibition was granted by the Court of King's Bench, on the ground that a cuſtom was only triable at common law. But no intimation is given in the report of the caſe as to the opinion of the Court with reſpect to the operation of the ſurrender, or the validity of ſuch a cuſtom; but only that if there could be ſuch a cuſtom, it was not within the juriſdiction of the council, but triable at common law (*x*).

However, there can be no doubt but that if the uſual ſymbol be not uſed, and a cuſtom requiring that very ſymbol be good at law, that a Court of Equity would relieve on a valuable, a moral, or meritorious conſideration. Indeed, it would be very imprudent to depart from the accuſtomed mode; and the particular ceremonies which have been long adhered to ought not to be capriciouſly forſaken.

Fine.

When the tenant is admitted, he uſually pays a fine to the lord. But this is no part of the admiſſion, but the conſequence of it: nor

(*x*) *Cro. Car.* 597. *Aſpye* v. ——— is

is it even a conſequence of neceſſity; for the lord may not only remit or waive it, (though ſuch remittance or waivure would, indeed, imply its exiſtence) but in many manors no fine is due in certain caſes; as in thoſe on the admiſſion of an heir at law, or of a perſon who had been before admitted to other premiſes held of the ſame manor.

But, however, when any fine is due of the ſpecies we are ſpeaking of, it is due as a conſequence of the admiſſion. For though an admiſſion may be without a fine, a fine cannot be due without an admiſſion. "Admiſſion is the *cauſe* of the fine:" (*y*) and therefore the fine muſt be the *conſequence* of the admiſſion. Hence the lord or ſteward cannot be warranted in refuſing admittance till the fine be paid, for till admittance it cannot be due. But the Doctrine of Fines will be the ſubject of our next chapter.

The next thing to be obſerved on admiſſion is the oath of fealty. Fealty.

In the days of barbariſm and ferocity, when man eſtimated his right by his power and regulated his honeſty by the length of his ſword; when nation ſupplanted nation in its poſſeſſions, and clan invaded clan without compunction or Origin of its inſtitution.

(*y*) 4 *Co.* 28. *a.* 2 *Durnf.* & *Eaſt*, 485. *The King* v. *the Lord of the Manor of Hendon*; and next *Chap.* of *Fines.*

ſhame; when glory was attached to rapine and deſolation and each mighty chieftain prided himſelf on being the greater thief, the chieftain became naturally jealous of his neighbours. He was conſcious that if his arm was againſt every man, every man's arm would be againſt him. Settled among the injured inhabitants of a country whom he had plundered and diſtreſſed, he was careful of his own ſtrength. But he was not only apprehenſive of the vengeance of the oppreſſed, he was equally jealous of his fellow lords. Hence he bound his followers by oath to be true to his perſon; and exacted the moſt ſolemn promiſes of fidelity from him who was about to be admitted into the tenancy.

Tenant at will was not ſworn unleſs by cuſtom.

A tenant ſtrictly at will was not to ſwear fealty, as the lord might amove him at pleaſure. A copyholder, however, not being conſidered as a tenant ſtrictly at will, but as irremovable while he performed his ſervices, was, in purſuance of cuſtom duly ſworn (*z*).

Who may take fealty.

It ſhould ſeem that any lord who has power to admit, has power to take fealty. But he need not take it in perſon: The oath may be adminiſtered by his ſteward or bailiff (*a*).

Who may ſwear it.

But the tenant cannot make his fealty by another; for a perſon cannot ſwear by attor-

(*z*) See *Fitzh. Abr. Tit. Serement. Co. Lit.* 63.

(*a*) *Co. Copyh. ſ.* 20. *Tr. p.* 15. *Litt. ſ.* 92.

ney

ney (*b*); though inſtances of one perſon ſwearing in the name of another are not wanting (*c*). Not by attorney.

An infant, it is ſaid, cannot be ſworn to fealty (*d*). But it ſhould ſeem that a feme covert ſhould be ſworn. For in the caſes of copyholds the feme covert only is admitted (*e*) and not the huſband; and, therefore, ſhe only muſt do fealty. The ſtatute of *George* the Firſt (*c.* 29.) has made no proviſion with reſpect to the oath. Infant, *feme covert.*

It is now, however, ſeldom adminiſtered in theſe or in other inſtances; but when the oath is taken it may be in this form;

"You ſhall ſwear that, as to the tenements to which you have been now admitted, you will be a true and faithful tenant to the lord of this manor. So help you God." Form of the oath.

As fealty is now only requiſite for the preſerving and evidencing the exiſtence of the ſubſiſting tenure, it is become uſual to reſpite it on the admiſſion of a copyholder; as his tenure is ſufficiently evidenced without it by the regular enrollments of ſuch admittance. And as

(*b*) *Co. Litt.* 68. *a.*

(*c*) *Harg. N.* (5). to *Co. Litt.* 68. *a.*

(*d*) 2 *Inſt.* 11. *Co. Litt.* 65. *a.* and the books there cited.

(*e*) See 1 *Hen. Blackſt.* 341-2. *Compton* v. *Collinſon.*

it

it muſt, when taken, be by the *oath* (*f*) of the tenant, it ſhould never be inſiſted on: for ſuch a ſolemnity ought not to be made ſubſervient to form.

When ſuch oath, however, is to be adminiſtered, it cannot be worded too ſimply and general. It ought not to include things which compoſe not its eſſence. In many forms of the oath the tenant is made to ſwear to do his ſervices, to pay his rents and dues, *&c.* This ought not to be done. The lord has, perhaps, a more effectual ſecurity for them by the laws of the land, by ſeiſure for non-performance, *&c.* than in the conſcience of his tenant. Where the end, therefore, may not only be equally, but better effected, recourſe ſhould not be had to ſo ſolemn and ſacred a ceremony.

The clauſe, indeed, relative to the performance of ſervices is to be found in forms preſcribed ſeveral centuries ago. It is included in that contained in our ſtatute book, of the time of *Edward* the Second; which form is thus:

"Hear you my lord *R.* that I will be faithful and true, and faith to you will bear, for the tenements which I claim to hold of you; and that I will lawfully acknowledge and do to you

(*f*) But a Court of equity has relieved in the caſe of a *Quaker*. See *Preced. Chanc.* 574. *Edmore* v. *Craven*; cited. the

the cuſtoms and ſervices that I ought to do at (or according to) the terms aſſigned; So help me God and the Saints (*g*).

The villein alſo ſwore that "he would be juſtified by his lord in body and goods."

In forms, however, of more ancient days, the clauſe we have animadverted on is not found: that given us by *Bracton* (*h*) is thus:

"Heareſt thou this my Lord *N.* that I will bear faith to you of life and member, body and goods, and of earthly honour, ſo help me God and his Holy Evangeliſts."

When a perſon did homage he never repeated it; its obligation was deemed commenſurate with his exiſtence. If he had even parted with his tenements his promiſe of amity

Fealty is ſworn in reſpect of the tenements.

(*g*) "Quaunt fraunk homme ferra feaute il tendra ſa main outre le livre & dirra iſſint; Ceo oiez vous Monſieur *R.* que jeo vous ſerrei foial & loial & foy vous porterei des tenementz qe jeo clayme de vous & loialment vous conueſtrei & loialment vous ferrei les cuſtumes & les ſervices qe faire doie as termes aſſignez Si moy eide dieux & les ſeintz."

(*h*) *Bract. Lib.* 2. *cap.* 35. *ſec.* 9. *fol.* 80. *a.* "Hoc audio domine N. quod fidem vobis portabo de vita & membris, corpore & catallis, & terreno honore: ſic me Deus adjuvet & haec ſancta dei evangelia."

was

was not annulled (*i*). If he acceeded to other tenements no further homage was performed; though he repeated his fealty. For though he could not twice become the lord's man, yet the ſelf ſame tenant might ſeveral times do fealty unto the ſelf ſame lord: and, therefore, if a copyholder ſurrender *White-acre* to me, I muſt do fealty for *White-acre*; and if he afterwards ſurrender *Black-acre* to me, I muſt do fealty for *Black-acre* alſo, though to the ſelf ſame lord (*k*).

Admittance by implication.

We come now to the enquiry into what ſhall amount to an admittance; or into an admittance by implication.

An admittance need not be in any particular form of words: For, if we look to the reaſon of the thing, we may conclude, ſays Chief Baron *Gilbert* (*l*), that any thing that expreſſes the lord's conſent to the ſurrender ſhould amount to an admittance; for it is his conſent only that is requiſite after the ſurrender, to make the ſurrenderee a tenant; and what matter is it whether that be done by *dominus conceſſit & admiſſus eſt*, or by an act that amounts to as much?

Thus if the lord ſays to the ſurrenderor, "You have ſurrendered to the uſe of ſuch an

(*i*) *Watk. on Gilb. Ten.* 403. No. LIX.
(*k*) *Co. Copyh. ſ.* 21. *Tr. p.* 16.
(*l*) *Ten.* 282-3.

one,

one, to which ſurrender I agree;" it will be a good admittance of the ſurrenderee (*m*).

So if the lord, *knowing of the ſurrender*, accept rent (*n*), fine (*o*), or fealty (*p*) of the ſurrenderee, it will be a good admittance. So it ſhould ſeem that an avowry on the heir or ſwearing him on the homage would be a ſufficient admittance, as it would be acknowledging him a tenant (*q*).

So if *I. S.* ſurrender to *I. N.*; and *I. N.* before admiſſion ſurrender to *I. D.*; and *I. D.* be

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(*m*) 3 *Bulſt.* 219. *per Cur. in Roſewell & Welch*, and *Ibid.* 232. in *Elkin & Waſtall.*

(*n*) 1 *Roll. Abr.* 505. *Copyh.* (X) *pl.* 2. *Froſwell & Welch.* 3 *Bulſt.* 217. &c. S C. *Godb.* 268-9. S. C.—See *Cro. Jac.* 403. S. C. *contra*; but in the report in *Cro. Jac.* it is ſaid that the acceptance of rent by the hands of *ceſtuy que uſe* could give no intereſt to him till the ſurrender was "*preſented in Court.*" But we have before ſee (*ante p.* 79.) that the lord may admit, if he pleaſes, *without a preſentment*: and it ſeems to be implied in this very report of the caſe that it would be a good admittance if it had been preſented; and, conſequently, if the lord could diſpenſe with the preſentment, this diſtinction falls to the ground: and the doctrine, as found in *Rolle, Bulſtrode & Godbolt* ſtands unimpeached, as well as upon the more ſolid baſis of rationality.

(*o*) See 3 *Bulſt.* 239. in *Rawlinſon v. Greeves*; and ſee *Dyer* 292. *a. pl.* 68.

(*p*) See *Dyer* 292. *a. pl.* 68.

(*q*) See *ante, p.* 246.

admitted

admitted: the admittance of *I. N.* would be implied, as it ſhould ſeem from the better authorities (*r*). For, as Lord *Coke* argues on another occaſion, "The lord's acceptance of the ſurrender is *quaſi* an admittance; for in that he allows him to make a ſurrender, he thereby admits him to have [an eſtate] whereof to make a ſurrender (*s*)."

Thirdly.—"An admittance is the acceptance of a perſon *into the Tenancy*."

Admittance is the acceptance of a tenant.

When, therefore, the perſon is not put into the *Tenancy* no admittance can take place.

Truſt.

If a copyholder ſurrender to the uſe of *A.* in truſt for *B.* *A.* will become *tenant* to the lord, and, conſequently, muſt be admitted: but *B.* taking only an equity, cannot poſſibly be the object of admiſſion, ſince he has nothing to do with the tenancy, which is filled by *A.* So if *A.* die, *his* heir muſt be admitted; but if *B.* die, *B*'s. heir, as ſuch, can no more need admittance than *B.* himſelf could have done. (*t*).

Condition.

So if a ſurrender be made on condition, the ſurrenderee muſt be admitted within the pre-

(*r*) See 3 *Bulſt.* 237. *Rawlinſon* v. *Greeve.* *Gilb. Ten.* 282-3. and *Watk.* No. CXXX. *p.* 457.

(*s*) See *Cro. Eliz.* 504. *Gyppen* v. *Bunney.*

(*t*) See *Moore* 890. *Rivet's* caſe. 1 *Vern* 441. *Trinity College, Cambridge* v. *Browne.* And *poſt. ch.* 7.

ſcribed

ſcribed time (*u*): And if the condition be fulfilled on the part of the ſurrenderor, or broken on that of the ſurrenderee, the ſurrenderor ſhall be in of his old eſtate, and, conſequently, require no new admittance; he being already in the tenancy (*w*). But if the ſurrenderor fulfil not the condition, or the ſurrenderee infringe it, the eſtate will become abſolute in the latter; and conſequently the former will have only an equity of redemption which lies not in tenure (*x*); and if the eſtate afterward come to the original ſurrenderor, he muſt be admitted to it as if it had never been in him (*y*).

Equity of redemption.

If a copyholder in fee ſurrender to a perſon for life, or for any other particular eſtate, he ſhall, on the determination of ſuch eſtate, be in of his old ſeiſin, and, conſequently, need no admittance (*z*).

Reverſion.

If a perſon have only an authority or power, but no legal intereſt in the copyhold, no admiſſion can be neceſſary; for he has nothing to do with the tenancy (*a*): but the appointee muſt be admitted, as *he* will become tenant to the lord (*q*).

Authority.

(*u*) See *ante*, *ch.* 3. *p.* 84, &c. 116, &c.
(*w*) 9 *Co.* 107. *a.*
(*x*) See *ante p.* 120. & *next chap.*
(*y*) 12 *Mod.* 49. *Benſon* & *Scott*, and *ante* 121.
(*z*) 9 *Co.* 107. *a.* & *poſt.*
(*a*) *Cro. Jac.* 199. *Beal* & *Shepherd* and *poſt.*
(*b*) See *ante* 105. & *poſt. ch.* 7.

The

Guardian. The bailiff who is only a pernor of the profits and no tenant, needs no admittance (*c*). Nor ſhall a guardian, as ſuch, however appointed, be admitted himſelf; *but the infant by ſuch his guardian*: The infant, and not his guardian, being tenant to the lord.

Survivor of joint-tenants. If there are ſeveral joint-tenants who have been admitted, and one die, the ſurvivors continue in of their former admittance: No new admittance can be neceſſary as there is no new tenancy created (*d*).

Coparceners and tenants in common. But it is otherwiſe with reſpect to coparceners and tenants in common; for they tranſmit ſeveral eſtates; and the perſon taking from them will be in of a new ſeiſin (*e*).

Widow, &c. A widow taking her freebench, or an huſband his curteſy, or on ſurviving his wife who was a termer for years, are ſaid to continue the ſeiſin of the deceaſed, and, therefore, to require no new admiſſion; though ſome aſſert it to be dependant upon cuſtom (*f*).

As the tenant could not marry without the conſent of the lord, he could not, by reaſon of

(*c*) *Co. Copyh. f.* 56. *Tr.* 128.
(*d*) *Co. Copyh. f.* 56. *Tr.* 130. *Kitch.* 122. *a.*
(*e*) *Co. Copyh. ubi ſup. Calth.* 64. and *poſt.*
(*f*) See *poſt, ch.* 7. and the books there cited.

ſuch

ſuch marriage, introduce a perſon into the tenancy but by the lord's approbation. If the lord approved of the individual it was a direct acceptance of ſuch perſon into his allegiance, family, or tenancy. No further admiſſion could have been requiſite: he had already accepted the perſon as worthy of his confidence, and as entitled to his protection.

On the marriage of a feme copyholder the huſband becomes entitled to the poſſeſſion of the lands,—to receive the rents and profits; and if ſhe took by deſcent he may even enter before admittance (*g*). He too muſt return the ſervices to the lord (*h*): And it is the huſband and not the wife who is to do ſuit and appear upon the homage in Court (*i*). With reſpect to freeholds, the huſband before iſſue had, did homage together with the wife; though *he* only repeated the words: yet, after having iſſue, he did homage alone (*k*). But as to copyholds, the having iſſue does not, generally ſpeaking, ſeem eſſential to curteſy. Without a ſpecial cuſtom copyholds are not ſubject to curteſy at all; or, in other words, the huſband is not entitled to them after the death of the wife. And in al-

(*g*) See *Watk. on Deſc.* 53-4. *Not.* and the books there cited.

(*h*) *Calth.* 52. *Cro. Eliz.* 149. *Hedd* v. *Chalener.*

(*i*) See *Cro. Eliz. ubi ſup.* And this is the uſual practice.

(*k*) See *Co. Litt.* 66. *a.* and 2 *Bl. Comm.* 126. *ch.* 8.

leging ſuch cuſtom when it does exiſt, the having iſſue is ſeldom lain as a requiſite (*l*). In ſuch caſes, therefore, he is as much fixed in the tenancy *before* iſſue, as much *initiated*, as the free-tenant would have been afterwards. The free-tenant *after* iſſue had, became one of the *pares curtis* and did homage ſolely to the lord. The copyholder, without iſſue had, became immediately enabled to ſit on the homage of the Court, as, it ſhould ſeem, did the free-tenant alſo. But, during the life of the wife, he ſat there, in the latter caſe, for her, or in her right; but afterwards, in caſe he was to retain the lands during *his* life, he ſat there in his own. Hence his eſtate was properly called his *free-bench*, denoting his capacity of ſitting on the bench of homagers. Hence, for the ſame reaſon, the eſtate of the widow is ſtill ſo denominated;—and hence alſo the term "benchers," or "free-benchers," is uſed in many manors, in cuſtumals and ancient rolls, for ſuiters or homagers.

If the huſband was a copyholder in his own right, he, of courſe, did ſuit; but when he died his wife became entitled by cuſtom to retain the

(*l*) In a great number of manors the cuſtom runs, generally, that the huſband ſurviving the wife ſhall have her lands, *&c.* In other, and chiefly more modern, cuſtumals, it is expreſsly ſaid, that he ſhall have them "whether iſſue or no iſſue."

lands,

lands, and then ſhe ſat on the homage (*m*); then ſhe became a *bencher* and did ſuit.—If the wife had a term for years in a copyhold, the huſband became entitled to it on her death by a kind of ſurvivorſhip, as in the caſe of real-chattels at common law (*n*).

In theſe caſes, therefore, the neceſſity or utility of an admittance of the huſband on the death of the wife, or of the wife on the death of the huſband, ſeems utterly precluded. The lord, by conſenting to the marriage, knew of, and accepted, the perſon ſo married to his tenant, as one of his own people. Such marriage, and co-habitation on the particular lands within the manor (for copyholders were ruſtics and employed in huſbandry,) were of ſufficient notoriety and publicity as to the other tenants. Add to this, that a fine being moſtly paid on marriage it would have been unreaſonable for the lord to exact another in conſequence of a new admiſſion (*o*). In all points there was no neceſſity or reaſon for an admittance of the one on the death of the other. The ſurvivor was al-

(*m*) For a woman may ſit upon the homage in a cuſtomary Court, or even in a Court Baron to preſent, &c. But ſhe ſhall not ſit in the latter Court as a judge to try iſſues, &c. See 2 *Inſt.* 119. and *Watk.* No. CLXVIII. to *Gilb. Ten.* 475.

(*n*) See *Hauchett's* caſe. *Dyer* 251. *a. pl.* 90. &c. *poſt. ch.* 7. 300.

(*o*) *Litt. ſ.* 174. & 209. *Co. Litt.* 117. *b.* 139. *b.*

ready known to the lord and approved of by him; and the legitimacy of the poſſeſſion was equally notorious to the tenants of the manor.

Particular eſtate and remainders.

Again; though a copyhold be limited to ſeveral perſons ſucceſſively by way of remainder, the admittance of the particular tenant will be the admittance of all; though he be only tenant for years: For the particular limitation and remainders over form but one eſtate at law (*p*). The ſeiſin extends to the remoteſt remainderman; and thoſe in remainder may ſurrender their portions (*q*), or enter when their eſtate falls into poſſeſſion, though they never were admitted perſonally themſelves.

Reverſion.

A reverſioner alſo may ſurrender (*r*) during the exiſtence of the particular eſtate; or, if the particular eſtate determine, he ſhall be in *ſtatu quo prius* (*s*). For a reverſioner continues in of his original ſeiſin.

(*p*) 4 *Co.* 23. *a.* 1 *Vent.* 260. *Batmore* & *Graves.* 1 *Mod.* 102. 120. S. C. 2 *Lev.* 107. &c. &c. See *poſt. ch.* 7. Of Fines, *p.* 296.

(*q*) *Cro. Eliz.* 504. *Gyppen* & *Bunney.* 3 *Leon.* 239. *Butler* & *Lightfoot.* 4 *Ibid.* 111. *Hegger* & *Felſton. Cro. Jac.* 31. *Auncelme* v. *Auncelme.*

(*r*) See *ante ch.* 3. *p.* 58.

(*s*) 9 *Co.* 107. *a.*

But

But if the particular tenant, remainder-man, or reverſioner, ſurrender to the uſe of another, or die and the eſtate deſcend, the ſurrenderee or the heir muſt be admitted; for the original ſeiſin cannot extend to them (*t*). Surrenderee of a remainder or reverſion.

So, if a copyhold be ſurrendered to the uſe of two or more perſons jointly, the admiſſion of one of them will be the admiſſion of all; as they all compoſe but *one tenant* to the lord (*u*). Joint-tenants.

Each being ſeized *per mie et per tout*, either of them may releaſe to his companions, and no further admiſſion of them will be requiſite; as the tenancy would not be altered by the ſeceſſion of the individual (*w*).

So, if one die, the others take his ſhare, and continue in on the original admiſſion (*x*).

And as ſeveral coparceners are but one tenant (*y*), one admiſſion will ſuffice for all of them. Coparceners.

(*t*) See *Watk. Gilb. Ten.* No. LXXVII. *p.* 417. and *poſt. ch.* 7. Of Fines, *p.* 297.

(*u*) *Kitch.* 122. *a.* 2 *Wilſ.* 162. *Roe* v. *Hutton.* and *poſt. ch.* 7.

(*w*) *Winch.* 3. *Ware* & *Pretty. Watk.* No. LXIX. to *Gilb. Ten.* 411.

(*x*) *Kitch.* 122. *a.*

(*y*) Vide *Britt. cap.* 119. *fol.* 270. *b. Fleta. Lib.* 6. *c.* 1. *f.* 17. *Litt. f.* 241. *Co. Litt.* 67. *a.* &c. 163. *b.* &c. 3 *Leon.* 13. *Ca* 30. *Bro. Coparceners*, 3. *Stat. Hibern.* 14 *Hen.* 3. 2 *P. Wms.* 614. &c. &c.

There is, indeed, a *dictum* of Lord *Kenyon* to the contrary, in the caſe of *Doe* d. *Tarrant* v. *Hellier* (z), that, though one joint-tenant fills the tenancy, it is not ſo as to coparceners: yet, if this be law, it would, I apprehend, be no ſmall difficulty to reconcile it with former deciſions (a).

In many manors, in various parts of the kingdom, particularly in *Suffolk* and *Eſſex*, it is uſual to admit coparceners together and to take ſingle fees. And in *Aliſon*'s caſe (b) the Lord Chancellor decreed that a ſurrender ſhould be made from a truſtee to two daughters, who were heireſſes to the premiſes; and that they ſhould be *admitted as coparceners*.

Coparceners may, indeed, be admitted ſeverally, and this is frequently done. And the reaſon for ſo doing is obvious, as to the ſteward, ſince it multiplies his fees. The fine, indeed, would be the ſame, whether they were admitted together or ſeparately; ſince, if they were admitted ſeparately, the ſingle fine would only be apportioned; but the fees would be encreaſed

(z) 3 *Durnf.* & *Eaſt*, 165.

(a) See the books before cited in (y) and the ſecond reſolution in the caſe of *Morris & al.* v. *Prince*. *Cro. Car.* 521.

(b) 9 *Mod.* 62.

according

according to the number of perſons admitted (*c*).

If coparceners are admitted together, it ſhould ſeem that they may *releaſe* to each other; as coparceners may releaſe at common law (*d*): and, if ſo, no further admiſſion can be neceſſary any more than in the caſe of joint-tenants. For a releaſe of a copyhold can only be good to thoſe who are already in the tenancy (*e*).

But, though coparceners *take* but one eſtate, they *tranſmit* ſeveral to their heirs; and, therefore, if one die, the others, or the heirs of the deceaſed, muſt be admitted to the portion which ſo devolves (*f*): *a fortiori*, if one coparcener ſurrenders to a ſtranger, ſuch ſtranger muſt be admitted; ſince he cannot poſſibly be ſuppoſed in of the original ſeiſin. And ſo alſo if one coparcener *ſurrender* to the uſe of the others, (as ſhe may do, as one might have *enfeoffed* the others at common law) (*g*), the others muſt be

(*c*) And, what is of conſideration, the *ſtamps* would now be multiplied on ſuch ſeparate admiſſions. See *Stat.* 37 *Geo.* 3. *cap.* 90. *ſ.* 11 & 12.

(*d*) *Co. Litt.* 273. *b. Gilb. Ten.* 73.

(*e*) 1 *Leon.* 102. *Wakeford's* caſe. *Gilb.* 300. 311, and *poſt. ch.* 7. Of Fines *p.* 292.

(*f*) *Co. Copyh. ſ.* 56. *Tr.* 130. *Calth.* 64. *Watk.* No. CLXXIV. to *Gilb. Ten.* 478.

(*g*) See *Gilb. Ten.* 73.

admitted to the portion ſo ſurrendered: for of that portion they would be in by the coparcener ſo ſurrendering, and not by their common anceſtor, and, therefore, of a new ſeiſin.

Tenants in comom.

But tenants in common taking ſeveral eſtates, they muſt be ſeverally admitted: Here being not only a plurality of perſons, but of tenants alſo, as the terms imply (*h*). And, conſequently, if one tenant in common ſurrender to another, or die, the ſurrenderee, or the heir, muſt be regularly admitted (*i*).

Lord.

If a copyholder ſurrender his copyhold to the uſe of the lord, the intereſt of the copyhold will be ſufficiently veſted in the lord immediately upon the ſurrender without any other act done; for the lord cannot admit himſelf (*k*).

Admiſſion is an initation into the *tenancy*, is an acceptance of *a tenant*; and at the ſame time inveſting the perſon admitted with the corporal poſſeſſion of the lands. Hence then is the lord incapable of admiſſion. He cannot be a tenant: he cannot hold of himſelf: *nemo poteſt eſſe tenens et dominus* was the maxim of early days: and as to the transfer of the cor-

(*h*) See 1 *P. Wms.* 21. 1 *Lord Raym.* 631. and *poſt.* *p.* 7. Of Fines.

(*i*) *Co. Copyh. f.* 56. *Tr.* 130.

(*k*) See *Co. Copyh. f.* 38. *Tr.* 85; and *Suppl. f.* 1. *p.* 145. and ſee 1 *P. Wms.* 17. *Lex Cuſtumaria*, 102. *ch.* 13

poral

poral poſſeſſion of the lands, it was accompliſhed by the delivery of the rod as a relinquiſhment of the ſeiſin.

In admitting a tenant, the lord is merely an inſtrument; whether the admittance be on a voluntary grant, a ſurrender, or deſcent. The lord in admitting is only an inſtrument.

If a copyhold eſcheat to the lord, he may demiſe it by copy again; but the demiſe of it by copy again is entirely dependant upon his own inclination. He may keep it in his own hands as long as he pleaſes; or he may, if he chooſes to do ſo, abſolutely change its nature and turn it into frank-fee. But though the *grant* of ſuch land by copy is dependant upon his will, the *admittance* upon ſuch grant is wholly regulated by the cuſtom. By the grant the lord has ſignified his choice, and his option ceaſes, when the cuſtom immediately attaches and imperiouſly preſcribes the form. He becomes a mere inſtrument: he cannot vary the tenure or eſtate, the rents or ſervices. If the cuſtom warrant an eſtate *durante viduitate* and the lord admit for life, it will not be obligatory on his ſucceſſor: if he reſerve ten ſhillings where the uſual rent was twenty, it will not be good. And, indeed, the law is very ſtrict in this point of reſervation; for though the ancient accuſtomable rent be reſerved according to the quantity, yet if the quality of the rent be altered, the heir may avoid this grant, For if the ancient rent from time to time had been twenty ſhillings

ſhillings in gold, and the lord reſerve it in ſilver, this variance of the quality of the rent is in force to deſtroy the grant: ſo if the ancient rent has been accuſtomably paid at four feaſts in the year, and the lord reſerve it at two feaſts. So, if two copyholds eſcheat to the lord, the one of which has been uſually demiſed for twenty ſhillings rent, the other for ten ſhillings rent, and he grant them both by one copy for one rent of thirty ſhillings; this is not good: and ſo if a copyhold of three acres eſcheat; which has ever been granted for three ſhillings rent, and the lord grant one acre, and reſerve *pro rata* one ſhilling rent, the true and antient rent will not be reſerved (*l*).

In admittance on a deſcent or ſurrender the lord is alſo a mere inſtrument. In the latter caſe, he has only a power or authority to admit according to the ſurrender. He cannot vary the eſtate limited by the ſurrenderor, or grant it to a perſon whom the ſurrenderor has not deſignated. If he admit otherwiſe, however, ſuch his act may bind himſelf, it will be by no means obligatory on others. If a ſurrender be to the uſe of *A.* and the lord admit *B.* ſuch admittance will be without warrant and, therefore, void; and the lord may notwithſtanding ſuch admittance, grant admittance again to *A.* If he ad-

(*l*) *Co. Copyh. ſ.* 41. 2 *Bl. Comm.* 370. *ch.* 22. and *ante ch.* 3. Of Grants *p.* 48.

mit

mit *A. and B.*, *A.* ſhall take the whole; and the admiſſion of *B.* ſhall have no operation. If the ſurrender had been to *A.* for life, and the lord admit him in fee, *A.* would only take for life agreeably to the ſurrender. If the ſurrender had been to *A.* abſolutely, and the lord admit him on condition; or if the ſurrender had been on condition, and the lord admit him abſolutely; the ſurrender ſhall controul the admiſſion (*m*).

The ſurrenderee is in by the ſurrenderor.

On admittance on a deſcent the perſon admitted is *in* by his anceſtor (*n*), and on a ſurrender by the ſurrenderor (*o*); and not by the lord; and, therefore he ſhall be paramount the lord's charges (*p*). And, in like manner, he who is admitted on a grant is, on ſuch admittance, in by the cuſtom; and, therefore, not ſubject to any charges or incumbrances of the lord (*q*).

Relation.

And as the ſurrenderee is thus, on admiſſion, in by the ſurrenderor, ſo ſuch admiſſion ſhall

(*m*) 4 *Co.* 28. *b. Co. Copyh. f.* 41. 3 *Burr.* 1543. *Baddley* v. *Leppingwell.* 4 *Ibid* 1961. *Roe* d. *Noden* v. *Griffiths.*

(*n*) See 4 *Co.* 22. *b. Brown's* caſe.

(*o*) See *ante ch.* 3. *p.* 106.

(*p*) *Co. Copyh. f.* 41. *Tr.* 91.

(*q*) 8 *Co.* 63. *Swayne's* caſe. *Watk.* N. LXXXVI. to *Gilb. Ten. p.* 430. and *ante ch.* 2. Of Grants *p.* 45.

relate

premiſſes, ſo that the reverſion continues in him, and the condition be broken or fulfilled (as the caſe may be), or the particular eſtate determine, he ſhall be in *ſtatu quo prius*; and ſo no new admittance can be requiſite, and, conſequently, no fine can be due (*a*).

Alit. of a grantee of ſuch reverſion.

But if the original copyholder convey the reverſion to a ſtranger, ſuch ſtranger cannot enter before his admiſſion. For before his admiſſion he is not tenant to the lord. Such reverſion lies in tenure; and the reverſioner cannot place another in the tenancy without the lord's conſent: he can, therefore, only paſs his reverſion by ſurrender on which an admiſſion would be requiſite; and, conſequently, a fine would be due (*b*).

Surrenderor taking a new eſtate.

It was ſaid by *Lord Mansfield*, in the caſe of *Roe* d. *Noden* v. *Griffith*, according to *Sir James Burrow*, that if a copyholder in fee (to which eſtate he had been regularly admitted) ſurrender to the uſe of himſelf for life or in tail, with remainders over, and the ultimate limitation to himſelf and his heirs, he need not be admitted on ſuch ſurrender; for he was tenant already;

(*a*) 9 *Co.* 107. *a.* 1 *Leon.* 174. *Bulleyn & Grant. Cro. Eliz.* 148. S. C. *Kitch.* 123. *a. Calth.* 60. *Co. Copyh. ſ.* 56. *Tr.* 149. *Gilb. Ten.* 181. 194. 276. See alſo 2 *Juſt. Blackſt. Rep.* 1046.

(*b*) See *Gilb. Ten.* 181. and *Watk.* N. LXXXIII. *p.* 429.

and

and conſequently would not be ſubject to a fine (*d*).

But this poſition is open to much obſervation.

In Mr. *Juſtice Blackſtone*'s report of the ſame caſe (*e*), the admiſſion of the copyholder is ſaid to have been *compelled*.

Beſides, though the *ultimate* limitation was the *old* eſtate it does not follow that the *prior* one was ſo —If a perſon ſeiſed of freehold lands deviſe to his heir for life, the heir ſhall be in by *purchaſe*; but if he deviſe to fifty ſtrangers with the ultimate limitation to his own right heirs they would be in by *deſcent*: in the firſt caſe the heir would take *a new eſtate*; an eſtate for life; not the eſtate in fee which was in the anceſtor; in the latter he would take the *old* eſtate; a portion of that very fee.

The particular eſtate, therefore, taken by the ſurrender, was *not* the eſtate which the tenant had before, as the reverſion was. It was a *new* eſtate to *which* he had never been admitted. "The lord," indeed, "knew his tenant;" but an admiſſion is not merely an acceptance of a perſon as a tenant, *but as a tenant of the particular lands*.

(*d*) See 4 *Burr.* 1952.

(*e*) See 1 *Blackſt. Rep.* 605.

If a perſon had been regularly admitted to *Black Acre, and had ſworn fealty to the lord*, and purchaſed *White Acre* afterwards, he muſt have been admitted to *White Acre* alſo (*f*); yet "the lord knew his tenant:" he had accepted him as a tenant, generally, and had ſecurity for his fidelity. In ſome manors, indeed, he would not pay *a fine*; but he certainly ought to be admitted equally as if he was to pay one.

In *Burrow* it is ſaid that the lord could not have compelled a new admiſſion of the huſband, even if the wife had died; and there could be no admiſſion of the children unborn. But if the wife had died during the life of the huſband, it could not have made *him* the more or the leſs a tenant. Had ſhe died, there were *truſtees* to take the eſtate: there was a veſted remainder in them for preſerving contingent ones.

Again, it is there ſaid, "a perſon could not be admitted who was *tenant before*." This is true if we confine it to the *ſame eſtate*. He could not be admitted to the *ſame eſtate* to which he had been already admitted: he could not be placed in a *tenancy* which he already filled; or have that ſeiſin given him which he already had. "At leaſt," it goes on "it was not requiſite for *him*; though it might have been ſo for his *wife* and *children*." Till admit-

(*f*) See *Co. Copyh. ſ.* 21. *Tr.* 16.

tance,

tance, indeed, he would continue tenant; but this would be of his *old eſtate*, which he had *before the making of ſuch ſurrender*, and not of the eſtate *to be taken under its limitations*.—It muſt be upon *this* ground, therefore, that the doctrine is to be ſupported: The ſurrenderor needs no admiſſion; for he is already tenant to the lord, as to the lands, with reſpect to his *old eſtate*; which muſt continue till there be an admittance under the ſurrender. And the wife need not be admitted till the eſtate comes into poſſeſſion by the huſband's death. The ſurrender being for a *good* conſideration, cannot be revoked by the huſband, though there be *no* admittance; and the lord is bound by the acceptance of the ſurrender, and compellable to admit according to its limitations. The admittance of the ſurrenderor, therefore, may not be *eſſential*, as he would continue tenant as to his old eſtate: but it does not appear clear that the lord might not call him in by proclamation and compell him (as it is ſaid in Mr. Juſtice *Blackſtone*'s report of the caſe,) to be admitted under pain of forfeiture, to that eſtate *which he is to take under the ſurrender*. Where the lord is compellable to accept a ſurrender, he may, in his turn, compel an admiſſion as a conſequence. He may, indeed, waive ſuch admiſſion; but the waiving of ſuch admiſſion is an acknowledgement of his right to inſiſt on it if he choſes to do ſo.

As to the fine, indeed, much may be urged. For though a fine cannot be due without an admiſſion, an admiſſion may be without a fine. However as a *new eſtate* is limited it ſhould ſeem that a fine would be due; though I believe it is ſeldom taken *as to the eſtate of the ſurrenderor* in caſes like theſe.

Not due on a releaſe of right.

If a perſon having a right to a copyhold releaſe to the tenant by wrong, no fine will be, in conſequence, due (*g*); as the releaſe of a copyholder can operate only by way of extinguiſhment (*h*); and the releaſee having been already admitted, need not be admitted again.

or recovery of ſeiſin by a diſſeiſee;

So if a copyholder be diſſeiſed, and afterwards enter on the diſſeiſor, or recover by plaint in nature of an aſſize, he will need no new admiſſion, and, therefore, ſhall pay no fine; for he will be in of his old ſeiſin, and reſtored to his former tenancy (*i*).

—nor where the ſame eſtate is continued.

In caſes too in which the poſſeſſion of the deceaſed is, as it were, continued, as in thoſe of dower, *&c.* It ſeems no fine will be payable as no new admiſſion will be neceſſary: But for this ſee *poſt. p.* 299.

(*g*) *Co. Litt.* 59. *a. N.* (2.) 4 *Co.* 25. *b.* 6 *Vin. Copyh.* (2. *a.*) *pl.* 9. and ſee *Watk.* No. LXIX. to *Gilb. Ten.*

(*h*) See *ante p.* 6. 279.

(*i*) *Co. Copyh. ſ.* 56. *Tr.* 129.

Thirdly

Thirdly:—A fine is payable on the admiſſion "*of a tenant*". And here we may enquire who comes within that denomination at law. Now a *tenant* is he who *holds* of the lord (*k*); and, conſequently, there can be no tenant where there is nothing *held*: and, therefore, *Tenant, whom?*

A perſon having an equitable intereſt only, as *Firſt*, A *ceſtui que uſe* or *truſt* (for the ſtatute of uſes does not extend to copyholds (*l*), cannot be a tenant; as an uſe lies not in tenure (*m*), *Not payable by ceſtuy que truſt.*

And, as the feoffee to uſes was the tenant at common law (*n*), ſo here the perſon having the legal eſtate is tenant to the lord; and, conſequently, where a copyhold is deviſed to *A.* in truſt for *B.*, *A.* muſt be admitted; and on *his* admiſſion a fine will be due: And if the eſtate ſo deviſed be deſcendible, the heir or repreſentative of *A.* muſt be admitted on his death; but on the death of *B*, no admiſſion would be requiſite (*o*).

(*k*) *Co. Litt.* 1. *a.* & *b.*

(*l*) *Cro. Car.* 44. 2 *Veſ.* 257.

(*m*) 2 *Bl. Comm.* 331. *ch.* 20. See *Co. Copyh. ſ.* 42. 2 *Veſ.* 304. *Jenk. Cent.* 190. *Ca.* 92. *Hard.* 496.

(*n*) See *Jenk. Cent.* 190. *Ca.* 92. 2 *Veſ.* 304. *N.* (1) to *Co. Litt.* 271. *b.*

(*o*) See *Moore* 890. *Rivet's* caſe. 1 *Veſ.* 121. *Allen* v. *Poulton.* 1 *Burr.* 206. Earl of *Bath* v. *Abney.* 1 *Vernon* 441. *Trinity College, Cambridge*, v. *Browne.*

Covenant.

Secondly:—If a copyholder *covenant* to ſurrender to the uſe of *A.*; and *A.*, before a ſurrender be made, aſſign his intereſt to *B.* and *then* the ſurrender be made to the uſe of *B.* one fine only will be due on *B*'s admiſſion; as *A.* was never tenant to the lord (*p*).

Equity of redemption.

Thirdly:—So a perſon having *an equity of redemption* may diſpoſe of it by deed or deviſe without a ſurrender (*q*), and, conſequently, no admiſſion would be neceſſary, and conſequently no fine would be due. On forfeiture or breach of the condition, the ſurrenderee would become the legal tenant; who muſt thereupon be admitted and pay his fine (*r*).

Authority.

Fourthly:—So a perſon having *an authority* only, and not any legal intereſt or eſtate in the premiſes, is not a tenant; and, therefore, needs no admiſſion, and, conſequently, ſhall pay no fine: As if "*I order and direct*" my executors *to ſell* (*s*).

Aſſignment of bankrupt's eſtate.

Commiſſioners of bankrupt have an authority given them by the ſtatute to convey the copy-

(*p*) 2 *Durnf.* & *Eaſt*, 484. *The King* v. the lord of the manor of *Henden.*

(*q*) 1 *Atk.* 388. 390. 2 *Atk.* 38. 3 *Atk.* 75. 1 *Bro. Chan. Caſ.* 480. *Macnamara* v. *Jones*, &c.

(*r*) *Gilb. Ten.* 276 See 2 *Veſ.* 302. &c. *Fawcet* v. *Lowther.* 2 *Vern.* 367. *Tredway* v. *Fotherley.*

(*s*) *Cro. Jac.* 199. *Beal* & *Shepherd. Godb.* 46. *Ca.* 57. 2 *Wilſ.* 400. *Holder* d. *Sulliard* v. *Preſton.*

holds

holds of the bankrupt by deed indented and enrolled; but the perſon to whom they are conveyed is, by the expreſs proviſion of the act, 13 *Eliz. c.* 7. *ſ.* 3. to pay or compound for the accuſtomed fines. If the Commiſſioners, therefore, convey to the aſſignees, ſuch aſſignees muſt be admitted and pay their fines, and convey the copyholds to their vendee by the uſual mode of ſurrender. To avoid, therefore, the payment of double fines, it was recommended by *Lord Hardwicke*, in the caſe of *Drury* and *Man* (*t*), to the commiſſioners, to except copyholds out of the deed of aſſignment, and convey immediately to the purchaſer.

Bailiff of the manor as pernor of profits.

Fifthly:—Where, by the cuſtom of the manor, the bailiff of the manor is to have the wardſhip of the copyhold-heir, being under the age of fourteen, ſuch a guardian ſhall neither be admitted, nor pay a fine; becauſe he is but a pernor of the profits, and that not in his own right, but in the right of him to whom he is guardian (*u*).

Releaſee of the right.

Sixthly:—Where a perſon who has been wrongfully admitted obtains a releaſe of the *right*, no new admiſſion can be requiſite as he was before equally tenant to the lord; and,

(*t*) 1 *Atk.* 95.

(*u*) *Co. Copyh. ſ.* 56. *Tracts, p.* 128.

A reverſioner we have ſeen (*e*) may enter on the determination of the particular eſtate without a new admittance or fine; for he would be in of his old ſeiſin: but if ſuch reverſioner die during the continuance of the particular eſtate, his heir muſt be admitted and pay his fine; for a reverſion is a tenement (*f*): and the heir here takes it by deſcent.

(or reverſioner.)

(Joint-tenants.)

Secondly, Where a ſurrender is made to the uſe of two or more *jointly*, they are all but *one tenant* to the lord; and therefore, but *one* fine is due on their admiſſion. And on the death of one of them, the ſurvivors take his ſhare and continue in on the original admiſſion (*g*).

(Death.)

(Coparceners.)

So as ſeveral coparceners make but one tenant, *one* fine only would be due on their admittance (*h*).

If they are admitted ſeverally, the fine muſt be apportioned: as if three coparceners be admitted ſeverally, each muſt pay a third of the whole fine.

(Death.)

But when one coparcener dies, the others (or the heirs of the deceaſed) muſt be admitted to

(*e*) *Ante p.* 287-8.

(*f*) *Dyer* 137. *pl.* 26.

(*g*) See *Kitch.* 122. *a.* *Co. Copyh. ſ.* 56. 2 *Wilſ.* 162. *Roe* d. *Aſhton* v. *Hutton & al.* And *ante ch.* 6. *p.* 272.

(*h*) See *ante p.* 277.

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the ſhare of the one ſo dying, and pay their fine (*i*).

So tenants in common muſt be ſeverally admitted and ſhall pay ſeveral fines; they having ſeveral eſtates: here not only being a plurality of perſons but of tenants alſo, as the terms imply (*k*). Tenants in common.

Thirdly, Where the intereſt of the perſon claiming is only a continuance of the eſtate of the deceaſed. And firſt with reſpect to freebench. Continuance of the ſame eſtate.

There are, indeed, books in which it is laid down that the widow muſt be admitted to her freebench and pay her fine (*l*); yet, according to others (which ſeems the better opinion) ſhe ſhall be in of the eſtate of her huſband without admiſſion, and, conſequently, without fine: the eſtate in free bench being conſidered as an excreſcence growing of itſelf out of that of the Freebench.

(*i*) *Co. Copyh. ſ.* 56. *p.* 130. *Calth.* 64. *Gilb. Ten. Watk.* N. CLXXIV. *p.* 478. *Co. Lit.* 185. *a.* and *n.* (9).

(*k*) 1 *Pr. Wms.* 21. 1 *Lord Raym.* 631. *Fiſher & Wigg. P. Holt.* and *ante p.* 280.

(*l*) *Co. Copyh. ſ.* 56. *Tr. p.* 128. *Kitch.* 123. *a.* (who ſays that the *cuſtom of the Manor* is to be conſidered.) *Gilb. Ten.* 223-4.

huſband

husband and being, as it were, a continuance of it (*m*).

Curtesy.

Secondly, And so with respect to curtesy: for the husband shall have his curtesy without being admitted after the death of his wife (*n*),

Seisin in right of marriage.

Thirdly, So if a person intermarry with a feme copyholder in fee or for years, he will become intitled in her right, and shall not be admitted, and, therefore, shall not be subject to fine; nor, in the latter case, if he survive her (*o*).

And with respect to the three instances immediately preceding, we may remark that marriage, being originally with the consent of the lord, amounted to an admission of the husband as tenant. The husband on marriage became possessed in the right of the wife; and on marriage a fine was generally paid. A fine, there-

(*m*) *Hob.* 181. *Howard* v. *Bartlet.* 1 *Lev.* 20. *Chantrell* v. *Randall. Ibid* 172. *Newton* v. *Shafto. Hutton* 18. *Jurden* & *Stone.* See 5 *Burr.* 2787. *Vaughan* v. *Atkins. Watk. on Gilb. Ten. p.* 440. N. XCVII. *Noy.* 29. *Remington* & *Cole.*

(*n*) See the books cited in (*m*) and *Moore* 597. *Bullock* v. *Dibley.* 1 *Leon.* 4. *ca.* 8. 4 *Leon.* 117. *ca.* 236. *Watk. on Dese.* 53-4. not.

(*o*) *Dyer* 251. *a. Hauchets* case. 3 *Leon.* 9. *Dedicot's* case. *Calth.* 89. 95. *Co. Copyh. f.* 56. *p.* 129. *Gilb. Ten.* 333.

fore,

fore, having been already given, and the husband by marriage having become already fixed in the tenancy, it seems to follow that no subsequent admission could be requisite (*p*).

Executors must pay a fine.

It was once held that the executors continued the estate of their testator, and so needed no admission; but it is now settled that they must be regularly admitted and pay their fines (*q*).

But this must necessarily be understood of such estates or terms by reason of which the testator himself or original termor, would have been subject to admission. For had a copyholder *leased* for years by *licence*, the lessee would not require any admittance, as he would not become tenant to the lord; and, by consequence, his executors would need none. The term created by *demise* on licence, would not be a *copyhold*, but a common law, interest (*r*). Such interest might be assigned by the lessee without any further licence or consent of the lord (*s*): it is extendible at law (*t*); it may even continue after the determination of the copyhold (*u*). The *copyholder*

(*p*) See *Watk.* N. CXXXVI. to *Gilb. Ten.* 460. and *ante p.* 272-3.

(*q*) 1 *Burr.* 206. *Earl of Bath* v. *Abney.*

(*r*) See *Co. Copyh. f.* 51. *Tr.* 119-120.

(*s*) 1 *Roll. Rep.* 508. *pl.* 14. *Johnson* v. *Smart.*

(*t*) See *Watk.* N. CXLVII, VIII, IX. *Gilb. Ten.* 467.

(*u*) *Hutt.* 101-2. *Turner* v. *Hodges.* and *Watk.* N. CLIII. *Gilb. Ten.* 469.

is tenant to the lord: on *his* death his heir muſt be admitted and pay his fine. But the lord cannot notice the change of the leſſee: he has a tenant independantly of him. But if a term of years be limited on a *ſurrender*, or created by *deviſe* (as in the caſe of the Earl of *Bath* v. *Abney* (*w*), in *Hauchett*'s caſe (*x*) &c), it would then *be held of the lord by copy*; the termor would be a *tenant* to the lord; and, therefore, muſt be admitted and pay his fine.

Heir at law. In moſt manors a fine is due on the admiſſion of an heir: and though the heir may ſurrender before admiſſion, he ſhall not defeat the lord of his fine. The lord is not obliged to receive his ſurrender till the fine be paid (*y*).

Occupant. *Sir Edward Coke* tells us that if a copyhold be granted *durante vitâ*, and the grantee die, living *ceſtuy que vie*, and a ſtranger enter as a *general occupant*, he ſhall be admitted and pay a fine (*z*).

But the better opinion appears to be that there can be no *general* occupant of a copyhold

(*w*) *Burr.* 202.

(*x*) *Dyer* 251. *a.* and *ante p.* 300.

(*y*) *Watk.* No. CXXXVI. to *Gilb. Ten.* 406. See alſo *Fearne's Poſthum. Works*, 103. &c.

(*z*) *Co. Copyh. ſ.* 56. *p.* 128.

(*a*); though

(*a*); though there may be a *ſpecial* one (*b*); as if it be granted to *A. and his heirs* during the life of *B.* In which latter caſe, if *A.* die during the life of *B.* the heir of *A.* muſt certainly be admitted and pay his fine (*c*).

Several tenements muſt pay ſeveral fines.

Again: A fine is due "*for each tenement to which he is admitted.*" As where a copyholder has ſeveral lands, ſeverally held by ſeveral ſervices, by copy, the lord ought to aſſeſs and demand the fines ſeverally, for every parcel which is ſo ſeverally held (*d*).

Surrender by a particular tenant and remainder-men, &c.

But if the particular tenant and him in remainder or reverſion join in a ſurrender, the perſon to whoſe uſe the ſurrender is ſo made ſhall pay but one fine on his admittance; for but one eſtate is conveyed (*e*).

By coparceners.

So, if ſeveral coparceners join in a ſurrender, but one fine will be due on the admittance of the ſurrenderee (*f*).

(*a*) 2 *Lord Raym.* 1000. *Gilb. Ten.* 326.

(*b*) 2 *Juſt. Blackſt. Rep.* 1148. *Doe* d. *Lempriere* v. *Martin. Co. Copyh. ſ.* 56.

(*c*) See *Co. Copyh. ſ.* 56. *Tr. p.* 128. *Gilb. Ten.* 327.

(*d*) 4 *Co.* 27. *a. Taverner* & *Cromwell. Ibid.* 28. *a. Hobart* & *Hammond. Co. Copyh. ſ.* 56. *Dougl.* 722. *Grant* & *Aſtle*, and the caſe of *Searle* & *Marſh*, in *Fiſher on Copyh.* Appendix 280. 282.

(*e*) *Co. Copyh. ſ.* 56. *p.* 130. *Kitch.* 123. *a.*

(*f*) *Kitch.* 123. *a.*

And

By joint-tenants,

And ſo of a ſurrender by ſeveral joint-tenants (*g*).

By tenants in common,

And it is ſaid to be the ſame as to tenants in common (*h*).

But *quære* whether, if two tenants in common join in a ſurrender, it ſhall not operate as *ſeveral* grants; (they having ſeveral freeholds at common law); and ſo ſeveral fines be due: notwithſtanding the doctrine be delivered otherwiſe by *Sir Edward Coke*, &c.

For as tenants in common muſt be ſeverally admitted, they muſt, of conſequence, have ſeveral tenements: and, although ſeveral tenements be ſurrendered by one ſurrender, the perſon admitted to them muſt pay ſeveral fines (*i*). And this caſe differs, I conceive, eſſentially from the ſurrender of a particular tenant and a reverſioner, or of ſeveral joint-tenants, or coparceners; for in thoſe inſtances, but *one* eſtate is conveyed.

Fine on a recovery being ſuffered.

If a copyholder ſuffer a recovery by plaint in nature of a writ of entry in the *poſt* for his better aſſurance, and to defeat an eſtate-tail, thoſe who recover have ſeiſin by precept of *habere facias ſeiſinam*, and they are in the *poſt*, and by

(*g*) *Ibid.* & *Co. Copyh. ſ.* 56. *p.* 130.

(*h*) *Kitch.* & *Co. ubi ſupra.*

(*i*) See the books referred in (*d*) laſt page.

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the recovery; and, therefore, but one fine ſhall be paid to the lord; for the recovery was only for further aſſurance, and the ſurrenderee and all make but one tenant by copy, and ſo there is due but one fine (*k*).

Having thus ſeen *when* a fine is due, we will proceed to enquire, *firſt*, as to the *quantity* of ſuch fine; *ſecondly*, as to its *aſſeſſment*, *payment*, *and refuſal*; and *thirdly*, as to the *recovery* of ſuch fine when due.

And, *firſt*, as to the *quantity* of ſuch fine. Quantity of fine.

A fine is either certain or arbitrary.

A fine certain is when the *quantum* is fixed or definite, ſo that it cannot be exceeded by the lord. Fine certain.

But it is not neceſſary that it be abſolutely certain, if it be only relatively ſo; it is enough: for ſo that it be independant on the will of the lord, and reducible to a certainty by reference to ſomething elſe, it is ſufficient: as to pay ſo much as the lands are worth by the year at the time of admittance; for here the value of the lands may be aſcertained; being triable by a jury (*l*).

(*k*) *Kitch.* 122. *b.* *Co. Copyh. ſ.* 56. *Tr.* 130.

(*l*) 2 *Show. Rep.* 507. *Perkins* v. *Titus.* *Carth.* 12. S. C. 3 *Lev.* 255. S. C. 1 *Freem.* 494. S. C.

How proved whether certain or uncertain.

Whether a fine be certain or not muſt be decided by the Rolls of the manor (*m*). To prevent, therefore, their being conſidered as certain, it is uſual and prudent to vary them. But if it can be ſhown by a ſeries of ancient Rolls that they were, in remote times, uncertain, the entry of them as certain in ſubſequent Rolls, though for the period of two or three hundred years, will not make them certain. But the entry of a *few* payments will not be permitted to operate either way; but will be deemed to have crept in through the inattention or negligence of the ſteward. Thus it was held in Chancery, in *Lord Gerard's* caſe, that where by ancient Roll's it appeared that the fines of the copyholds had been uncertain from the time of *Henry* the third to the 19th of *Henry* the ſixth, and from thence had been certain, except twenty or thirty, that thoſe few ancient Rolls did deſtroy the cuſtom for certainty of fines: but that, if from the 19th *Henry* the ſixth all were certain except a few and *no* (*n*) uncertain Rolls before, thoſe few ſhould be intended to have eſcaped; and ſo not deſtroy the cuſtom for certain fines (*o*).

Uncertain fine.

An uncertain fine is where the *quantum* is dependant upon the will of the perſon impoſing

(*m*) See 2 *Bulſtr.* 32. *Allen* v. *Abraham.* *Toth.* 167.

(*n*) In *Godb.* it is "*ſo*," which deſtroys the ſenſe of the paſſage: it evidently is miſprinted for "*no*."

(*o*) *Godb.* 265.

or

or aſſeſſing it. And it belongs, of common right, to the lord or his ſteward to aſſeſs it; but there may be a cuſtom for the homage to do ſo (*p*).

Muſt be reaſonable.

But, though the fine be regarded as arbitrary, it muſt nevertheleſs be, in moſt caſes, a reaſonable one. Should the lord be permitted to aſſeſs an unlimited fine, it would open a door to much oppreſſion. He might uſe ſuch a power for the purpoſe of diſinheriting the heir. The law, therefore, has, in many caſes, reſtricted him in his demands.

Fixed by the homage.

In ſome manors, as before obſerved, if the lord ſhould be ſo exhorbitant in his demand that the tenant cannot acceed to it, he may have the fine aſſeſſed by the homage (*q*): but if no ſuch cuſtom exiſt, the tenant may juſtify a refuſal to pay it in many caſes; and the reaſonableneſs of it ſhall be determined on action brought (*r*).

Reaſonableneſs to be determined on action brought.

(*p*) See 1 *Roll. Rep.* 48. *Crabb* & *Bevis*, (cited.) 1 *Freem.* 494. *ca.* 669.

(*q*) See before (*p*) *Crabb* & *Bevis*.

(*r*) 13 *Co.* 1. *Willowe*'s caſe. *Moore* 623. *Dalton* v. *Hammond*. 3 *P. Wms.* 157. *Cowper* v. *Clarke*, and ſee the caſe of *Grant* & *Aſtle* in *Dougl.* But note; the lord is not obliged to prove its being reaſonable, the copyholder muſt ſhow it to be otherwiſe. *Hob.* 135. *Denny* & *Leman*.

When reſtricted to two years value;

In caſes where the lord is compellable to admit and the heirs of the perſon ſo to be admitted would alſo be ſubject to fines on acceeding to the eſtate, the fine muſt not exceed *two* years improved value of the lands, without deducting land tax &c. except quit-rents (*s*).

when not.

But where a *purchaſer* only is finable and not a perſon taking by deſcent, the lord ſhall not be reſtricted to two years, but may, if no cuſtom be to the contrary, take four, five, or even ſeven years value (*t*).

In ſome manors a perſon only fines upon his *firſt* purchaſe; as if he purchaſe an acre of land, he ſhall pay a fine on his admiſſion to it; but if he purchaſe fifty acres afterwards, he ſhall pay no further fine (*u*). In ſuch caſes alſo the lord is not reſtrained to two or to ſeven years value (*u*).

So in caſes where the lord is not compelable to admit, but the admittance remains merely voluntary, as on grants of eſcheated lands and the like; or where they are grantable only for life, *without a right of renewal*, the lord

(*s*) *Dougl.* 722. &c. *Grant* & *Aſtle*, and ſee 2 *Strange*. 1042. *Halton*, Bart. v. *Haſſell*.

(*t*) 1 *Freem.* 496. *Pinſent's* caſe, cited.

(*u*) Manor of *Harrow-on-the Hill*, &c. And noticed by *Nottingham*, C. in *Morgan* & *Scudamore*. See 1 *Freem.* 496. in *King* v. *Dillington*.

is

is under no reſtriction whatever (*w*). In theſe caſes he is under no obligation to grant at all: if he chooſes to do ſo, he may fix his own terms; if the perſon wiſhing to become tenant does not care to accede to them he is not neceſſitated to do ſo: no one is injured. Theſe caſes are not like thoſe where the perſon ſoliciting admiſſion has a legal right to ſucceed. Should the lord in thoſe inſtances be left to impoſe his own terms, the perſon ſoliciting might be deprived of his inheritance or prevented from exerting that power of alienation which the law has now inveſted him with. Here thoſe reaſons fail. The lord has a right to make the beſt bargain he can.

The rule, therefore, that the lord ſhall be confined to two years value of the tenements, is only applicable to certain caſes; and ſeems to have been too haſtily extended in ſome recent inſtances.

But before we diſmiſs the ſubject, we may advert to two caſes which peculiarly demand our attention, which are thoſe of *Morgan* and *Scudamore*, and *Wharton* & *King*.

The caſe of *Morgan* & *Scudamore* (*x*) is cited by *Lord Loughborough* in that of *Grant* *Morgan & Scudamore.*

(*w*) 13 *Co.* 3. See *Hetley p.* 6. and *Fiſh. Copyh.* 90. and ſee the caſe of *Wharton* v. *King*, *Anſtruther's Rep. in Exchq.* 659.

(*x*) 2 *Chan. Rep.* 134.

& *Aſtle* (*y*), and relied upon by his Lordſhip as fixing the fine to two years value. In *Morgan* & *Scudamore*, indeed, *Lord Nottingham* ordered ſuch fine to be given, but it was under the peculiar circumſtances of the caſe. The copyhold in that caſe, was granted *ſibi & ſuis* (*z*), for ninety nine years; but there was *a cuſtom alleged to compel the lord to renew*; and although no fine was payable during the ninety-nine years, yet the lands were ſubject to heriot, &c. But from the honourable Mr. *Legge*'s manuſcript copy of *Lord Nottingham*'s reports which the author of theſe pages has been permitted to conſult through the favour of Mr. *Hargrave*, it appears that his Lordſhip conſidered *one year and a half's fine to have been the reaſonable fine in common caſes*, refering to *Dow & al.* v. *Golding* in *Cro. Car.* 196. on which he relied, and therefore gave half a year's value *more* in this inſtance by reaſon of the fine being payable only once in ninety nine years: ſo that this caſe, inſtead of being an authority for a reſtriction of the fine to two years value, is a proof of the contrary.

But it ſhould ſeem that a fine would now be conſidered as due in the caſe of death within the term, whether the grant was *ſibi & ſuis* or whether the perſon taking took merely as exe-

(*y*) *Dougl* 727. *in not.*

(*z*) 2 *Chanc. Rep.* 134.

cutor

cutor (*a*): and, conſequently, on the renewal of the term, the reaſon for augmenting the fine in this reſpect would not now hold.

The other caſe of *Wharton* v. *King* is now reported by *Anſtruther* (*b*); and, it will, therefore, be neceſſary only to obſerve that it was determined in that caſe that in order to ſupport a cuſtom of renewal of copyholds for lives, the plaintiff muſt allege ſuch cuſtom to be on payment of a fine *certain*: to allege it to be on payment of a *reaſonable fine* will not be ſufficient. If ſuch cuſtom be not found to renew on payment of a fine *certain*, the lord may inſiſt upon his own terms.

Fine on remainder.

When a perſon is admitted to an eſtate in remainder, the fine is uſually one half.

Tenant for life muſt pay a whole fine.

A tenant for life is to pay a whole fine, equally as if he were tenant in fee in caſes where the heirs are finable. For in ſuch caſes, the admiſſion of the tenant in fee is only the admiſſion of an individual; and, when he dies, his heir muſt be admitted again. The fine, therefore, becomes payable on the admiſſion of a new tenant; and if he is to take the immediate

(*a*) See 1 *Burr.* 206. *Earl of Bath* v. *Abney.*

(*b*) *Rep. in Exch.* 659. and ſee the caſes of the *Duke of Grafton* v. *Horton*, before the Lords. 3 *Bro. Parl. Caſ.* 269. and *Lord Abergavenny* v. *Thomas*, in 1 *Abr. Caſ. Eq.* 120. in the margin, and both cited in *Wharton* v. *King*.

poſſeſſion and to enjoy it for life, the whole fine will be due. A tenant for life, therefore, ſhall pay the ſame fine as a tenant in fee ſimple whoſe heir is to fine on ſucceeding him: if indeed the heir of the tenant in fee is not to fine on taking the poſſeſſion, the reaſon will not hold; and a leſs fine muſt be impoſed upon the tenant for life.

Fine on eſtate for ſeveral lives.

Where there are many lives, the rule, generally, is to take for the ſecond life half what the immediate tenant for life pays, and for the third half what the ſecond pays. So that when there are two admitted, the fine is as much as for one life and half as much more; when there are three, as much and half as much as a fine for two lives. Or as Sir *James Burrow* expreſſes it, the fine for two lives is the *ſeſqui* of that taken for one; and the fine for three is the *ſeſqui* of that taken for two (*c*).

Succeſſive.

But this muſt be underſtood of perſons taking *ſucceſſive*, or one after another; for if they take as joint tenants, or as tenants in common it would be different. In the former caſe the admiſſion of one would be the admiſſion of all; and but one fine would be due: in the latter, they muſt be ſeverally admitted and the ſingle fine be apportioned; *i. e.* each ſhall pay a ſeve-

(*c*) 1 *Burr.* 217. in marg.

The rule above noticed is known to the author of theſe pages to be obſerved in many manors in various parts of the Kingdom.

ral

ral fine; but ſo that, when their fines be added together, they ſhall make the original fine for the whole. Thus if the cuſtom be to pay two years value on admiſſion, and two tenants in common be admitted, each ſhall pay two years value of his moiety: and two ſuch fines will be the ſame as the ſingle fine for the entire tenement.

If a copyhold be granted to *A.* and his heirs during the life of *B.* and *A.* die living *B.* the heir of *A.* ſhall, on his admiſſion, pay ſuch fine as, according to the cuſtom of the manor, a *purchaſer* ought to pay. For he does not take *by deſcent* but *as ſpecial occupant* (*d*). Occupant.

His taking, therefore, as ſpecial occupant and not as heir, is, as to moſt manors, of importance in this reſpect. In many manors, as before noticed, a perſon taking *as heir* ſhall pay *no* fine. In ſome he is to pay a *greater* fine than a perſon taking by *purchaſe*; and in others a *leſs*.

The fine of the ſpecial occupant ſhould be proportioned to the probable duration of the life of the *ceſtui que vie*: for as he is compellable to be admitted under pain of forfeiture, ſo the lord, on the other hand, is compellable to grant him

(*d*) See *Gilb. Ten.* 327. and ſee alſo 10 *Co.* 58. *a.* and 2 *Bl. Comm.* 259-60. *ch.* 16.

that

that admittance: And if an unreaſonable fine be impoſed, the Courts would equally interfere and aid him as on a ſtrict deſcent. (*e*).

Aſſeſſment, &c. *Secondly*; As to the aſſeſſment, payment, and refuſal of the fine.

We have already obſerved that it belongs of right to the lord or the ſteward to aſſeſs the fine, but that by cuſtom the homage may do ſo (*f*).

But an aſſeſſment by ſome perſon or other is requiſite (*g*); though the aſſeſſment by the lord or ſteward may be made out of the manor (*h*).

As the fine does not become due till the tenant is actually admitted, it cannot, of conſequence, be aſſeſſed or impoſed till then, in caſes where the lord is compellable to admit. If the lord, indeed, be not compellable to admit, the fine muſt of courſe be agreed upon in the previous treaty. In thoſe caſes the lord muſt make the beſt bargain he can; and the tenant muſt uſe his diſcretion.

Tenant may refuſe to pay an unreaſonable fine.

Where the tenant may compel the lord to admit him, and the fine is not certain, if the

(*e*) *Watk.* No. CLXXI. to *Gilb. Ten.* 476.
(*f*) *Ante p.* 307.
(*g*) *Dougl.* 727. 731. *in not.*
(*h*) 1 *Lord Raym.* 44. *Yaxley* v. *Rainer.*

lord

lord or his ſteward impoſe a fine which he conceives to be exorbitant, and there be no cuſtom in the manor for the homage to ſettle and fix it, he may juſtify a refuſal to pay ſuch fine (*i*). If, indeed, it ſhall appear on the matter being brought into Court that the fine ſo aſſeſſed was manifeſtly reaſonable, and that the tenant had objected to it without good cauſe, the law would not allow him to ſhelter himſelf under any alleged doubts; but would declare it a forfeiture of the tenement on which the fine was aſſeſſed (*k*). However the Courts are not rigid in this reſpect; but allow much latitude to the tenant's diſcretion. If no ſiniſter intention be apparent on the part of the tenant, the law will not permit a forfeiture to incur by reaſon of his refuſal, though the fine prove eventually not to have been exceſſive (*l*).

Bill in equity will not lie for relief in caſe of an exceſſive fine.

A bill will not lie in equity for an individual copyholder to be relieved againſt an exceſſive fine: The reaſonableneſs of it muſt be determined at law: Though a bill may be brought to ſettle a *general* fine payable by all the copyholders of a manor, and this to avoid a multiplicity of ſuits (*m*).

(*i*) 4 *Co.* 27. *b. Hobart* & *Hammond.*

(*k*) *Co. Litt.* 60. *a. N.* (1). *Parker*'s caſe cited.

(*l*) 1 *Roll.* 507. *pl.* 5. 3 *Lev.* 308. *Barnes* & *Corke.*

(*m*) 3 *P. Wms.* 155. *Cowper* v. *Clerk.*

Whether

Several fines must be severally assessed.

Whether the fine be certain or uncertain, care must be taken that in case there be several tenements held by the same person, the fines be assessed and demanded for the tenements severally. For if a person be admitted to several tenements, one fine cannot be assessed for the whole. If there are three acres severally held, there must be three several fines: And if those three acres, so held, be surrendered to the use of *A.*, *A.*, on his admission, must pay three fines as the surrenderor had done before. So, if several copyholds escheat to the lord, and he regrant them to be held by the ancient services, they shall be severally held as they were before the escheat; and consequently there must be several fines (*n*).

Fine to be set according to the improved value.

Again, the fine must be set according to the improved annual value at the time of the assessment, and not according to the annual rent: for the annual rent may in many cases be comparatively trifling; as where the lands have been let on lease many years before by licence of the lord (*o*). And in assessing the fine according to the annual value, no deductions are to be made except as to quit-rents (*p*).

(*n*) 4 *Co.* 27. *a. Taverner* & *Cromwell. Ibid.* 28. *a. Hobart* & *Hammond. Dougl.* 722. *Grant* & *Astle.*

(*o*) 2 *Strange*, 1042. *Halton*, Bart. v. *Hassell.*

(*p*) See *Dougl.* 727. *Grant* & *Astle, in not.*

Where

Where the fine is certain, the tenant ought to be ready to pay it on demand immediately upon his admittance: but where it is uncertain, a day and place ſhould be appointed him by the lord or ſteward to pay it in: and if no ſuch appointment be made he ſhall be allowed a reaſonable time for paying it by the law; for he is not obliged to pay it on demand: for as it was impoſſible for him to know what the lord would aſſeſs he could not come prepared for its payment (*q*). When to be paid.

If the lord aſſeſs an uncertain fine when in truth the fine ſhould be certain, the tenant, to prevent forfeiture, ſhould *tender* what he conceives the certain fine (*r*). Tender.

In order to incur a forfeiture for non-payment, the place appointed for payment of the fine ſhould be within the manor, and ſo appear. But in an action of debt for the fine it is not eſſential that the place be expreſsly alleged to be within the manor, for it ſhall not be preſumed to be out of the manor: And, indeed, it is ſaid that the lord may appoint a place for payment out of the manor, and recover in debt; though ſuch appointment would not be good in Where to be paid.

(*q*) 4 *Co.* 27. *b.* 28. *a.* *Hobart* & *Hammond:* But this reaſon does not ſeem to apply in caſes where the lord is reſtricted to two years value for then the tenant might have come prepared.

(*r*) *Cro. Jac.* 617. *Gardiner* & *Norman.*

caſe

caſe of forfeiture (*s*). But this doctrine appears queſtionable. For if an appointment out of the manor would be good in one caſe it ſhould ſeem that it would be ſo in the other; ſince the difference would be in the event, and not in the thing itſelf. The argument too urged by Sergeant *Rotheram* in the caſe of *Yaxley* v. *Rainer*, has much weight; "that if ſuch appointment be good the tenant might be forced to go all over *England* in queſt of the lord, to the tenant's great prejudice." And it does not appear that the lord can, in any caſe, oblige the tenant to go out of the manor, except it be to a Court within the ſame honour, by cuſtom, as before noticed (*t*).

Demand muſt be of the perſon of the tenant.

How to be made.

When the fine is regularly aſſeſſed, (for a regular *aſſeſſment* is abſolutely eſſential (*u*) there muſt be a demand of ſuch fine, and that of the *perſon* of the tenant (*w*), by the lord or his ſteward (*x*), of the ſpecific ſum aſſeſſed: for if he demand a larger ſum than is due, he muſt make a new demand before he can recover at

(*s*) 1 *Lord Raym.* 44. *Yaxley* v. *Rainer.*

(*t*) *Ante p.* 253.

(*u*) *Dougl.* 727. 731. *in not.*

(*w*) *Hob.* 135. *Denny & Lemman.* 2 *Mod.* 229. *Trotter* v. *Blake, in Scacc.*

(*x*) 2 *Mod.* 229. *Trotter* v. *Blake, in Scacc.* And the ſteward may demandit without an expreſs authority in writing. *Trotter* v. *Blake.*

law;

law; for he ſhall not, on ſuch former demand, recover what is actually due, but judgment ſhall be given againſt him (*y*).

The ſtatute 9 *Geo. c.* 29. relative to copyholders who are covert or under age, and entitled by deſcent or ſurrender to the uſe of a laſt will, ordains that the fines impoſed on their admiſſion ſhall and may be demanded by the bailiff or agent of the lord, by a note in writing ſigned by the lord or his ſteward and left with ſuch infant or feme covert, the guardian or huſband, or with the tenant or occupier of the premiſes; but that no forfeiture of the copyhold tenements of ſuch infant or feme covert ſhall be incurred by reaſon of the non-payment of their fines. As to infants and femes covert.

Thirdly, as to the *recovery* of fines. Recovery of fines.

As no fine is due 'till admittance, the admittance of the tenant is compulſory (*z*). If the tenant does not come to be admitted on the uſual proclamations, the lord (except in the caſes of femes covert and infants whoſe eſtates are protected by the ſtatute of 9 *Geo.*) may ſeize the lands to his own uſe till the tenant appear and be admitted; and if there be a ſpecial cuſ- Seiſure on non-admittance.

(*y*) See *Skin.* 249. *Titus* v. *Perkins.*

(*z*) *Co. Copyh. f.* 41. *Tr. p.* 96. 2 *Bl. Comm.* 371-2. *ch.* 22.

tom

tom for that purpoſe, may ſeize them as an abſolute forfeiture (*a*).

Proviſions by ſtat. 9 *Geo.* in caſes of infants and femes covert;

In the caſes of femes covert and infants who are entitled by deſcent or ſurrender to the uſe of a laſt will, it is provided by ſtatute that if they do not come in to be admitted in perſon, or the former by their attornies (which they are thereby empowered to make,) or the latter by their guardians, or having no guardians, by their attornies (which they may appoint by virtue of that act), at one of the three then next Courts, the lord or ſteward, on due proclamation, *&c.* may appoint ſuch guardians or attornies for the purpoſe of admiſſion; and thereupon impoſe the juſt fines. And if ſuch fines are not paid as directed by that act, the lord is empowered to enter and take the profits (but without liberty to fell timber) till ſuch fines and the conſequent expences are ſatisfied, rendering an account of ſuch profit, *&c.* to the perſons entitled.

But if the huſband of a feme covert, or the guardian of an infant, pay ſuch fines, then they may reimburſe themſelves out of the profits of the eſtates as direct by that act (*b*).

(*a*) 3 *Durnf.* & *Eaſt*, 162. *Doe* d. *Tarrant & al.* v. *Hellier & al. Watk. Gilb. Ten.* 230. & N. C. *p.* 442. 1 *P. Wms.* 151. *North* v. *Earl of Strafford.* 2 *Atk.* 449. *Clayton* v. *Cookes*, and *ante p.* 234, &c.

(*b*) 9 *Geo. c.* 29.

And

And, independantly of theſe remedies, thus expreſsly given by the ſtatute of *George* the firſt, the lord may maintain an action of *indebitatus aſſumpſit* for the fine againſt an infant who has been actually admitted, on ſuch infant's coming of age; and according to Mr. Juſtice *Yates* in the caſe of *Evelyn* v. *Chicheſter* (*c*), even during his minority. Action at law.

For it has now been long ſettled that debt or *indebitatus aſſumpſit* will lie for a fine (*d*). Debt or *aſſumpſit*.

And ſuch action of debt or *aſſumpſit* is not within the ſtatute of limitations (*e*).

If the lord admit and die before the fine be paid, it will belong to his executors; who may bring an *aſſumpſit* or debt for it (*f*). But it will be *no charge on the lands*; and therefore the perſons entitled to fines unpaid can have no action or bill, or other remedy, againſt a *purchaſer* or *ſurrenderee* for any fines which became payable before the purchaſe (*g*). On the lords death, the fines then due belong to his executors.

(*c*) 3 *Burr.* 1717.

(*d*) *Carth.* 92. *Shuttleworth* & *Garnett.* *Dougl.* 722. *Grant* & *Aſtle*, and notes.

(*e*) 1 *Levinz.* 273, cited in *Hodgſon* v. *Harris*, as ſo adjudged. 2 *Keb.* 536. *pl.* 56. S. C. *Gilb. Ten.* 178.

(*f*) 3 *Lev.* 261. *Shuttleworth* v. *Garnet.* *Carth.* 90. S. C. 1 *Show.* S. C.

(*g*) 1 *Roll's Abr.* 274. *Chancerie* (P). *Hitcham* v. *Finch.*

Waiver of admittance by the heir.

It has been repeatedly obſerved that the fine is not due till admiſſion, and it ſeems to follow inevitably that where the heir waives admittance no fine can be claimed. But it has been doubted by ſome whether the heir could waive the poſſeſſion or not: yet ſuch doubt does not appear to be well founded; but, on the contrary, it ſeems now acknowledged that he *may* refuſe admiſſion, and conſequently not be ſubject to a fine (*h*).

Fines due on licence to alien, &c.

We come now to the third claſs of fines payable by copyholders;—thoſe which are due on licences by the lord to empower the tenant to do certain acts; as to demiſe, &c.

There is little to be obſerved on this head; ſuch fines being rarely due. It is laid down, however, that there muſt be a *ſpecial* cuſtom proved to ſupport the claim of ſuch fine; for, by general cuſtom, fines are due only on admiſſions (*i*). But if ſuch a cuſtom exiſt, debt will lie for its recovery (*k*). In the caſe of *Yaxley* v. *Rainer* (*k*), the fine was for *licence to aliene*; and there is an expreſs proviſion in

(*h*) See *Watk. Gilb. Ten.* 292. and No. CXLI. *p.* 462. 3 *Burr.* 1719. 2 *Atk.* 449. and 3 *Pr. Wms.* 151. and *Siderf.* 58. in *Wheeler* v. *Honour.*

(*i*) *Co. Copyh. ſ.* 56. *p.* 127.

(*k*) 1 *Lord Raym.* 44. *Yaxley* v. *Rainer.*

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the ſtatute 12 *Car.* 2. (*l*) to prevent the abolition of any fines for alienation due by particular cuſtoms of particular manors and places, other than fines for alienations of lands or tenements holden immediately of the king *in capite*.

(*l*) *C.* 24. *ſ.* 6.

CHAP. VIII.

Of FORFEITURE.

Nature of.

AS the copyholder originally held ſtrictly at the will of the lord, and is ſtill regarded by the law as holding at will in caſes where the cuſtom of the manor has not reſtricted that will and protected the eſtate of the copyholder, ſo, if the copyholder does any act incompatible with the relation in which he ſtands as tenant, if he denies his dependency, or refuſes to comply with the terms of the grant, the law deems it a determination of the will by which he holds; and the eſtate ſhall return to the lord who granted it.

The copyholder, indeed, is not now dependent upon the caprice of his lord; the law and the cuſtom of the particular manor of which he holds have now, in many reſpects, protected and eſtabliſhed his eſtate. But then he can only claim the protection of cuſtom while he complies with its dictates. If he regulates not his conduct by the rules which that cuſtom has preſcribed, he is not entitled to its favour. If he tranſgreſſes the cuſtoms of the manor, the cuſtoms of the manor can no longer ſupport his eſtate. While he performs his ſervices and returns and fulfils the duties of his tenancy, the law

law interpoſes in his behalf and controlls the will of his lord; but the law cannot countenance him in doing wrong. If he obeys not the law, the law muſt with-hold its protection.

What acts ſhall amount to a forfeiture.

We will, therefore, enquire into what acts of the copyholder will be deemed a determination of the will by which he holds and amount to a forfeiture of his eſtate.

But before we proceed we muſt obſerve that ſuch acts of the tenant muſt, from the very nature of the thing, be *wrongful* acts, and that the will to be determined is that *of the lord*; for ſhould the tenant determine *his own will* to hold, by any *rightful* act, it would indeed be a relinquiſhment or extinguiſhment of the tenancy; but it would be wholly different from *a forfeiture* at law.

Treaſon or felony.

If a copyholder be attainted of treaſon or felony, his copyhold is immediately forfeited to the lord (*m*). And this not only as a puniſhment for his crime, but becauſe his capacity to fill the tenancy is at an end. On attainder he becomes dead in law; and he cannot continue his eſtate after he has forfeited his exiſtence. And in the caſes of corruption of blood he can have no one to inherit his eſtate where cuſtom

(*m*) *Hawk. P. C. b.* 2. *c.* 49. *ſ.* 7. and the books there referred to.

had made it hereditary. In ſome manors (*n*), indeed, this corruption does not take place; but, though the father be attainted, the ſon ſhall ſucceed.

Outlawry. If the copyholder be outlawed for a capital crime, the ſame reaſoning ſeems to apply (*o*). Till the outlawry be reverſed, he has no legal exiſtence, nor can there be any one to perform the ſervices or returns. Beſides, as ſuch outlawry amounts to a conviction, his puniſhment incurrs.

Alienation. If the tenant by copy convey any common law intereſt in his lands to another, it is a forfeiture; as ſuch an act is incompatible with his tenancy. Thus if he make a feoffment with livery (*p*), or levy a fine (*q*), it would not only be a determination of his eſtate at will, but an abſolute diſſeiſin of the lord.

So if he make a leaſe for years without licence (*r*), though by parol only (*s*); or even

(*n*) See *Robinſ. Gav. b.* 2. *c.* 4.

(*o*) See *Gilb. Ten.* 242. *Watk.* Ed.

(*p*) *Litt. ſ.* 74. 4 *Co.* 21. *b.*

(*q*) See 3 *Durnf.* & *Eaſt*, 162. *Doe* d. *Tarrant & al.* v. *Hellier, & al.*

(*r*) *Co. Litt.* 59. *a.*

(*s*) *Moore* 393. *Eaſt* v. *Harding*. *Cro. Eliz.* 498. S. C.

if

if it be to commence *in futuro* (*t*); it will be a forfeiture of his tenement. So if he exceed his licence; as if he have a licence to demiſe for two years, and he demiſe for three; or if his licence be not in other reſpects purſued (*u*).

But a common law intereſt muſt actually paſs in order to work a forfeiture. For if the copyholder execute a deed of feoffment, but make no livery, he ſhall not forfeit (*w*): Or if, on ſuch feoffment, he even make a letter of attorney to give ſeiſin, it ſhould ſeem, according to the better opinion, to be no forfeiture till livery be actually made (*x*).

So if he make a bargain and ſale, though ſuch bargain and ſale be regularly enrolled, yet no forfeiture will incur (*y*). For a bargain and ſale can only paſs what the bargainor has a right to convey. Now the copyholder, being only a tenant at will, can convey nothing by right; and a bargain and ſale cannot operate by wrong, as a feoffment; it could work no diſcontinuance at common law: and, conſequently, as it can convey nothing, either by wrong or by right, nothing can be conveyed: and, con-

(*t*) *Eaſt & Harding, ubi ſup.*

(*u*) *Cro. Eliz.* 395. *Jackſon & Neal.*

(*w*) *Co. Litt.* 59. *a.*

(*x*) N. (3) to *Co. Litt.* 59. *a.*

(*y*) *Gilb. Ten.* 255. and *Watk.* CXVIII. *p.* 451.

ſequently, no intereſt can paſs at all; and, conſequently no forfeiture can be effected. Beſides, a bargain and ſale only paſſes an uſe, till the ſtatute, operating upon ſuch uſe, transfers the poſſeſſion. Now the copyholder being only a tenant at will cannot be ſeiſed to an uſe; and if there be no uſe raiſed, the ſtatute cannot attach. Hence, no eſtate paſſing, there can be no forfeiture.

Again, with reſpect to a leaſe for years, an intereſt (z) muſt actually paſs. For a promiſe or covenant to demiſe, will not amount to a forfeiture; for it is no leaſe (*a*).

Again, if a copyholder for life ſurrender in the Court of the lord to the uſe of another in fee, it will be no forfeiture (*b*). For a ſurrender, like a bargain and ſale, can only paſs what the perſon making it may lawfully transfer (*c*). Beſides, even on the ſuppoſition that ſuch ſurrender *would* paſs the fee, it would be the fee of the *copyhold* intereſt, and not of an

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(z) For it is not neceſſary that the leſſee ſhould actually enter, ſee *Moore* 184-5. *per Anderſon*, and *Ibid.* 392. *Eaſt* & *Harding*.

(*a*) See *Gilb. Ten.* 233-4. *Watk.* Ed. & 3 *Keb.* 638. *Richard's* v. *Ceely*. 1 *Bulſt.* 190. *Hamlen* & *Hamlen*.

(*b*) *Moore* 753. *Oldcot* v. *Levell.* 4 *Co.* 23. *a*. *Bullock* & *Dibley*.

(*c*) *Ante ch.* 3 *p.* 52, 98.

eſtate

eſtate at common law; which is eſſential, as before remarked, to work a forfeiture. A ſurrender too is made with the privity of the lord, or, which is the ſame thing, of his ſteward; and if the lord accept ſuch ſurrender in fee from the copyholder for life, and admit the appointee accordingly, it will be his own act.

So it is ſaid if the copyholder for life ſuffer a recovery in the manor Court it will be no forfeiture even of his life eſtate, without a ſpecial cuſtom; as the lord is party to a recovery; beſides the eſtate recovered can be only a copyhold, and not a common law eſtate, and therefore the dependency is not denied (*d*).

Another cauſe of forfeiture is the denial or refuſal of ſervices. For the copyholder by denying or refuſing his returns thus breaks the conditions by which he held. In ſuch caſe the conſideration fails; and, of conſequence, the lord is entitled to reſume his grant. Denial or refuſal of ſervices, &c.

If the tenant in open Court expreſsly diſclaims being tenant to the lord; if he declares that he owes him no ſervices, and conſequently refuſes rendering any; theſe are evident acts of forfeiture (*e*).

(*d*) See *Gilb. Ten.* 235. & *Watk.* N. CII. *p.* 443. 2 *Mod.* 32. *Keen* v. *Kirby.*

(*e*) See *Kitch.* 124. *b.* *M.* 42 *Ed.* 3. *pl.* 9. *f.* 25. *Co. Copyh. ſ.* 57. *Tr.* 132.

So,

So, if when in Court, he refuſe being ſworn on the homage (*f*); or if, when ſworn, he refuſe to preſent according to his oath (*g*): if, on a *perſonal* (*h*) ſummons, he perform not his ſuit, without alleging a ſufficient cauſe; (*i*) a forfeiture ſhall be incurred.

So if he come not in to be admitted on due proclamation, it will be a forfeiture, either *quouſque* or abſolute according to the cuſtom (*k*). Or if, on admittance, he pay not his fine (*l*).

But we muſt obſerve that the refuſal of ſervices muſt be a wilful and abſolute refuſal to be the cauſe of forfeiture (*m*): for if it be

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(*f*) *Co. Copyh. f.* 57. *Tr.* 132.

(*g*) *Co. Copyh. f.* 57. *Tr.* 132. *Moore* 350. *pl.* 468. 3 *Leon.* 109. *Sir Chriſtopher Hatton*'s caſe, and *Sir R. Southwell* & *Thurſton*, cited.

(*h*) For a *general* ſummons, as at the church, *&c.* is not ſufficient. *Cro. Eliz.* 505. *Criſp* & *Fryer*, and *Sir Chriſtopher Hatton*'s caſe cited. *Godb.* 142. *ca.* 176. *Lord Dacres* & *Harleſton*, and *Winter*'s caſe cited. 1 *Roll. Abr.* 507. *Copyh.* (C) *pl.* 7, 8, 9. See 1 *Leon.* 104. *Sir J. Braunche's* caſe, and 3 *Bulſt.* 80. *Belfield* v. *Adams*, & *Gilb. Ten.* 229-230.

(*i*) See *Co. Copyh. f.* 57. 1 *Leon.* 104. *Sir J. Braunches* caſe.

(*k*) See *ante* 230. 234, &c.

(*l*) See *ante* 315. 319.

(*m*) *Godb.* 142-3. *ca.* 176. and *Winter*'s caſe, cited.

doubtful

doubtful whether they be due or not, and the copyholder refuſe till they be aſcertained (*n*); or if, on the demand of rent, he ſays he has no money; and ſo entreats the lord to forbear (*o*); no forfeiture will thereby be incurred (*p*).

A copyholder, though regarded as a tenant at will, is obliged to keep the tenements in repair; for which reaſon he is entitled to botes or eſtovers by the general-law, without alleging a ſpecial cuſtom (*q*). He is, therefore, contrary to other tenants at will, or at leaſt to thoſe who hold ſtrictly at will a common law eſtate, (*r*), anſwerable for permiſſive as well as for voluntary waſte (*s*). Waſte.

Thus if a copyholder pull down a houſe (*t*), or ſuffer it to become ruinous for want of timely reparation (*u*); if he build a new one (*w*);

(*n*) *Gilb. Ten.* 230. 2 *Mod.* 229. *Trotter* v. *Blake.*

(*o*) *Godb.* 142-3.

(*p*) See further *Co. Copyh. f.* 57. *Gilb. Ten.* 235, &c. *Comyns's Dig. Copyh.* (M. 4.) *Viner's Copyh.* N. (*e.*) &c.

(*q*) See 1 *Lord Raym.* 551. *Aſhmead* & *Ranger*, and *Gilb. Ten.* 237. *Watk.* Ed.

(*r*) *Litt. ſ.* 71. and *Co. Litt.* 57. *a.*

(*s*) See *Co. Litt.* 63. *a.* and *Harg.* N. (1.) *Co. Copyh. ſ.* 57. *Tr.* 134-5. 1 *Salk.* 186. *Eaſtcourt* & *Weeks.*

(*t*) 1 *Bulſt.* 50. *Brocke* v. *Beare.*

(*u*) *Co. Copyh. ſ.* 57. *Tr.* 134-5.

(*w*) See *Watk. Gilb. Ten.* 235. and N. (*E.*)

a fortiori,

a fortiori, if he pull the new houſe down again; (*x*) he ſhall forfeit his tenement.

So if by his neglect or miſconduct the lands become uſeleſs or unprofitable; as if he ſuffer the banks to decay, ſo that the lands become overflowed or marſhy (*y*); or if he change the nature of them; as by turning arable land into hop ground or a piſchary (*z*) or the like; it will be a forfeiture.

So if he fell timber (except for the neceſſary botes or eſtovers (*a*),) unleſs he be warranted by a ſpecial cuſtom (*b*). If he fell timber for botes he may ſell the tops and bark towards defraying the charge of reparation (*c*). So, as he may not know exactly the quantity which may be neceſſary, he will be warranted in felling what may appear to be requiſite; and may keep the overplus for future uſe (*d*). But if he

(*x*) *Ibid.* and ſee 1 *Bulſt.* 50. *Bracke* v. *Beare.*

(*y*) *Co. Copyh. ſ.* 57. *Tr.* 135.

(*z*) See *Litt. Rep.* 264, &c. *Paſton* & *Ulbert. Hutt.* 102. S. C. *Hetl.* 5. S. C. (*Paſton* & *Mann.*) *Gilb. Ten.* 236.

(*a*) *Ante p.* 231. (*g*).

(*b*) 1 *Lord Raym.* 551. *Aſhmead* & *Ranger.* 2 *Durnf.* & *Eaſt*, 746. *Mardiner* v. *Elliott*, and ſee *Bracke* v. *Beare*, *ubi ſupra. Fiſh. on Copyh.* 98, &c.

(*c*) 3 *Bulſtr.* 281. *Stanford* & *Stevens.*

(*d*) See *Cro. Eliz.* 498. *Eaſt* & *Harding.*

ſuffer

ſuffer timber, felled under pretence of eſtovers, to decay and become uſeleſs (*e*); or apply it towards the reparation of other tenements (*f*), it will be a forfeiture at law.

And as the copyholder cannot fell the timber, ſo he cannot dig for mines. He is tenant at will, and has no right to the ſoil (*g*). But it ſeems that he may dig for marl to manure the lands with, or take turf for neceſſary fuel, and it will be no forfeiture; as theſe ſeem to be proper eſtovers (*h*).

So a copyholder may forfeit by abating ancient incloſures; or by incloſing where no incloſure was before (*i*). So, by abating, removing, or confounding landmarks (*k*).

If the ſteward ſhew a Court-roll to a copyholder to prove that the land is holden by copy, Tearing the rolls, &c.

(*e*) 1 *Roll. Abr.* 508. *Copyh.* (D) *pl.* 20.

(*f*) See 2 *Vern.* 537. *Naſh* v. *Com. Derby.*

(*g*) See 2 *Atk.* 189. *Dean & Chapter of Ely* v. *Warren.* 1 *P. Wms.* 406. *Biſhop of Wincheſter* v. *Knight. Gilb. Ten.* 327.

(*h*) See *Gilb. Ten.* 327.

(*i*) See *Preced. in Chanc.* 568. *Sir H. Peachy* v. *Duke of Somerſet.* 1 *Strange* 447. S. C. *Vin. Copyh.* 113. (*D. c.*) *pl.* 9. S. C. *Hutt.* 102. *Paſton* v. *Utbert. Litt.* 264. S. C. and *Hetl.* 5. S. C. by the name of *Paſton* & *Mann.*

(*k*) See the books referred to in (*i*).

and

and the copyholder ſay he is a freeholder, and ſhew a deed, pretending thereby to procure his land to be freehold, and tear in pieces the Court-roll, it will be a forfeiture (*l*).

So, if he forge a cuſtomary to the injury of the lord (*m*).

What ſhall be forfeited.

If the ſame perſon holds ſeveral acres of land of the ſame manor by ſeveral tenures, as *Black-acre* by the rent of three-pence, and *White-acre* by the rent of four-pence, and *Green-acre* by the rent of ſix-pence, and commits waſte in part of *Black-acre*, or makes a feoffment of part of *Black-acre*, or denies the rent of that acre; he ſhall forfeit the whole of *Black-acre*; but it ſhall be no forfeiture of *White* or of *Green-acre*. For, although they are all held by the ſame perſon, and perhaps included in the ſame copy, yet every acre is ſeverally held; and to every acre there is a ſeveral condition in law *tacite* annexed; and, therefore, the forfeiture of one cannot be the forfeiture of any of the others (*n*).

(*l*) *Co. Copyh. f.* 57. *Tr.* 132.

(*m*) See 3 *Leon.* 107. *Taverner* v. *Cromwell.* & *Dyer.* 322. *b.* S. C. And note; ſuch forgery is expreſsly within the *ſtat.* 5 *Eliz. c.* 14. *f.* 2.

(*n*) 4 *Co.* 27. *a. Taverner* & *Cromwell.*

But

But though any act of the copyholder which is confined to one tenement cannot be the cauſe of forfeiture as to the others, yet it ſhould ſeem that any ſuch act which is confined to *part* of the ſingle tenement ſhall be a forfeiture of the whole of that ſingle tenement. It is acknowledged that it is ſo as to waſte; as if the copyholder commit waſte in part of that ſingle tenement, as by cutting down a ſingle tree, the whole tenement ſhall be forfeited (*o*): But we are told by *Rolle* (*p*), that if the tenant, holding ſeveral acres by the ſame tenure, make a feoffment of one acre only, that one acre only ſhall be forfeited: yet *Sir Edward Coke* tells us (*q*) that a feoffment of part of the tenancy is the forfeiture of the whole. And although Chief Baron *Gilbert* (*r*) thinks the reaſon is with *Rolle*, and that it would even hold as to waſte in caſes where there were no buildings on the premiſes, yet we ſhould conſider that as ſuch feoffment or act of waſte is incompatible with the relation which the tenant bears to the lord (*s*), it muſt be a forfeiture of the *tenancy*, or *a diſſolution of that relation*. By ſuch act the tenant has broken

(*o*) *Ibid* 1 *Rolle. Abr.* 509. *Copyh.* (E) *pl.* 2.

(*p*) 1 *Roll. Abr.* 509. *Copyh.* (E) *pl.* 1. cites *Fuller* & *Terrye* as ſo adjudged.

(*q*) 4 *Co.* 27. *a. Taverner* & *Cromwell.*

(*r*) *Ten.* 247.

(*s*) See *ante p.* 324.

the

the reciprocal obligation and ſhown himſelf unworthy of the confidence repoſed in him.

The act of the particular tenant ſhall not be a forfeiture of any remainders over (*t*), though ſuch remainders be contingent (*u*); nor ſhall it be a forfeiture of a reverſion (*w*).

If a copyholder leaſe by licence of the lord and the leſſee make a feoffment, the term of years only ſhall be forfeited and not the eſtate of the copyholder (*x*). So, if, after ſuch leaſe by licence, the copyholder commit any act of forfeiture, the leaſe ſhall not be forfeited; but will remain good againſt the lord (*y*).

But ſuch copyholder ſhall, in conſequence of his own act, forfeit his reverſion or remainder (*z*); for ſuch reverſioner or remainder-man is in the ſeiſin or tenancy. But a perſon having

(*t*) 1 *Roll. Abr.* 509. *Copyh.* (F). *Co. Copyh. f.* 59. *Tr.* 138. *Gilb. Ten.* 244. &c. and *Watk.* No. CVII. Unleſs there be a ſpecial cuſtom. See 9 *Co.* 107. *a.*; and *quære.*

(*u*) See *ante ch.* 5. *p.* 194, &c.

(*w*) *Co. Copyh. f.* 59. *Tr.* 138.

(*x*) 1 *Roll. Abr.* 509. (F) *pl.* 4. cites *White & Hunt* as ſo adjudged.

(*y*) 2 *Rolle's Rep.* 372. cited as ſo adjudged. See *Watk.* No. CLIII. to *Gilb. Ten. p.* 469.

(*z*) 1 *Leon.* 1. *Borneford & Packington.*

only

only an equity cannot forfeit (*a*); for he is not a tenant

If a perſon be wrongfully admitted to a copyhold and commit a forfeiture, and afterwards the perſon having the right releaſe to him, it has been ſaid that the lord cannot enter, as the perſon has, in conſequence of ſuch releaſe, a different eſtate from that of which the forfeiture was committed (*b*). But this opinion does not ſeem law (*c*): for the perſon admitted was as much tenant to the lord before the releaſe as afterwards; and the lord ought not to be injured by the private agreement of the parties.

A perſon *non ſanæ memoriæ*, an ideot, or lunatic, are incapable of forfeiting (*d*). So of an infant under the age of diſcretion (*e*). Who may forfeit.

But an infant above the age of diſcretion and under that of twenty-one years, ſhall forfeit, if he does any act to the diſheriſon of the lord. If he does voluntary waſte, or wilfully

(*a*) 2 *Wilſ.* 13. *Roe* d. *Jefferys* v. *Hicks*. *Co. Copyh. ſ.* 59. *Tr.* 138. and *ante ch.* 3. *p.* 101.

(*b*) See *Gilb. Ten.* 248-9.

(*c*) See *Watk.* N. CVIII. to *Gilb. Ten.* 445.

(*d*) *Co. Copyh. ſ.* 59. *Tr.* 136.

(*e*) *Ibid.*

refuſes his ſervices; if he commits treaſon or felony; he ſhall forfeit his lands (*f*).

But if he make a leaſe for years without licence, contrary to the cuſtom (*g*), or replevy againſt the lord, or the like (*h*), he ſhall not forfeit; nor ſhall he be anſwerable for permiſſive waſte (*i*). So he ſhall not forfeit for not coming in to be admitted on proclamation made (*k*).

A feme covert ſhall not forfeit by reaſon of her own act (*l*), unleſs it be for treaſon or felony (*m*); but if ſhe do any act which may amount to a forfeiture with the conſent of her huſband, ſhe ſhall loſe her lands (*n*).

And if an huſband commit waſte, or any other act which tends to diſheriſon (*o*), or if he refuſe his ſervices (*p*), the tenements of the

(*f*) *Ibid.* and ſee the caſe of Sir *H. Peachey* v. Duke of *Somerſet*, *Prec. Chanc.* 568. 1 *Str.* 447. &c.

(*g*) See *Gilb. Ten.* 293 & *Watk.* N. CXLIV. *p.* 463.

(*h*) *Co. Copyh. ſ.* 59. *Tr.* 137.

(*i*) *Ibid.*

(*k*) See *ante ch.* 6. *p.* 234. and *Stat.* 9 *Geo. c.* 29.

(*l*) *Co Copyh. ſ.* 59. *Tr.* 136.

(*m*) See 1 *Hawk. P. C. c.* 1. *ſ.* 11. 4 *Bl. Comm. c.* 2. *p.* 29. and *c.* 29. *p.* 382.

(*n*) *Co. Copyh. ſ.* 59. *Tr.* 136-7.

(*o*) 4 *Co.* 27. *a. Clifton* & *Molineaux.*

(*p*) See *Cro. Eliz.* 149. *Hedd* & *Chalener.*

wife

wife ſhall be forfeited. But if he make a leaſe unwarranted by cuſtom without licence, it is ſaid it will not be a forfeiture, at leaſt not after his death, unleſs the wife do any thing to affirm it (*q*). So, if the huſband commit felony or treaſon it ſhould ſeem that it would be no forfeiture of the wife's eſtate; as he could only forfeit what he had in himſelf (*r*).

But if a ſtranger commit waſte without the conſent of the huſband, it is ſaid to be no forfeiture, though the wife conſent (*s*). Yet it ſhould ſeem from later authorities that, at leaſt in other caſes, a forfeiture ſhall incur by reaſon of the act of a ſtranger; and the copyholder muſt have his remedy over againſt him (*t*).

If a guardian commit waſte he ſhall forfeit the wardſhip only, and not the inheritance of the copyhold (*u*).

(*q*) 1 *Roll. Abr.* 509. *Copyh.* (F) *pl.* 30. and the books cited in 6 *Vin.* 140. *Copyh.* (*S. c.*) *pl.* 5. and *Hedd* v. *Chalener, ubi. ſup.*

(*r*) See *Staundf. P. C.* 187. *b.*

(*s*) *Co. Copyh. ſ.* 59. *Tr.* 137. 4 *Co.* 27. *a.* *Clifton* & *Molineaux.*

(*t*) See *Watk. Gilb. Ten.* 235. *N.* (*d*).

But equity may relieve. See *Toth.* 237-8. *Taylor* & *Hoge.* and cited in 6 *Vin.* 152. *Copyh.* (*E. d.*) *pl.* 2.

(*u*) *Co. Copyh. ſ.* 59. *Tr.* 137.

If a joint-tenant commit waſte he ſhall forfeit only his own part, and not that of his companion (*w*). But it is ſaid if huſband and wife be joint copyholders of the purchaſe of the huſband, and the huſband be afterwards, during the coverture, attainted of felony, no forfeiture can accrue, as the wife muſt take by ſurvivorſhip; but if the purchaſe had been *before* marriage it would have been a forfeiture of a moiety (*x*).

Who ſhall take advantage of a forfeiture.

We have already obſerved that a copyholder holds at the will of his lord, and that by an act which is regarded as a cauſe of forfeiture he determines that will by breaking the conditions on which he held. The tenancy being, therefore, at an end, in conſequence of ſuch act, it muſt neceſſarily follow from the very nature of the thing, that it muſt be the lord who is entitled to enter.

Even in the caſe of treaſon, therefore, the lord, and not the king, ſhall have the copyholds of the perſon attainted; unleſs, indeed, ſuch copyholds be *expreſsly* given to the king by a particular act of parliament. But they ſhall not be forfeited to the king by the general words of a ſtatute (*y*), by reaſon of the manifeſt injury

(*w*) *Ibid. Tr.* 138.

(*x*) *Supplem. to Co. Copyh. ſ.* 10. *Tr.* 175.

(*y*) See 2 *Vent.* 38. *Lord Cornwallis's* caſe.

which

which would accrue to the lord; as the king could not hold them, if forfeited, as a copyholder, and, conſequently, the tenure and all the fruits of that tenure would be loſt, or at leaſt ſuſpended (z).

And ſo if a copyhold be limited to *A.* for life with remainder to *B.*; and *A.* commit a forfeiture; the lord ſhall take advantage of it, and not *B.* For by *A*'s. act the tenancy, as to him, became extinguiſhed or deſtroyed; and, conſequently, the lord became entitled to the premiſes, and no one elſe could claim. *B.* will be entitled to the remainder on *A*'s death; but he will not be entitled till that event, by the expreſs words of the grant. He could not be entitled to any remnant of *A*'s. eſtate, if any ſuch remnant exiſted; but by the act of forfeture *A*'s. eſtate was wholly at an end. The lord, therefore, muſt be, by the very terms, entitled till the death of *A.* (a).

But with reſpect to the duration of the eſtate forfeited by *A.* and the commencement of the eſtate ſo limited to *B.* we muſt obſerve that if *A*'s. eſtate be limited to him for life, generally, without ſaying expreſsly for his natural life, it ſhall be determined on his *civil* death; and, con-

(z) *Ante ch.* 2. *p.* 31.

(a) 1 *Roll. Abr.* 509. *Copyh.* (G) *pl.* 1.

ſequently, on ſuch his civil death *B*'s eſtate ſhall commence (*b*).

But if *B*'s. eſtate be expreſsly limited to commence on the forfeiture or determination of *A*'s. eſtate, though the lord, from the very nature of the thing, would be equally entitled to the eſtate forfeited, yet he ſhould not be ſuffered to retain it contrary to the expreſs words of his grant (*c*).

We will now, therefore, proceed to enquire, who may be ſuch a lord as to be capable of entering for a forfeiture?

And here we may obſerve, generally, that any one who is *dominus pro tempore* may take advantage of a forfeiture committed within his own time (*d*).

And a perſon ſhall ſometimes take advantage of a forfeiture who was not, properly, a lord at the time, nor at any time afterwards; as the grantee of the freehold of the copyhold, or his leſſee: for by the grant, the premiſes were ſevered from the manor; and no manor was con-

(*b*) See *Watk.* N. CXXIII. to *Gilb. Ten.* 454. and 2 *Show. Rep.* 150. *Benſon* v. *Strode.*

(*c*) 3 *Lev.* 94. *Strode* v. *Denniſon. Watk. N.* (*h*) to *Gilb. Ten.* 173.

(*d*) See *Roll. Abr. Copyh.* (G). *Comyns's Dig. Copyh.* (*M.* 6.) and *Vin. Copyh.* (*T. c.*) &c.

ſtituted

ſtituted by the grant; the grantee therefore can be no lord.

But the very lord by ſuch grant paſſed his own intereſt, though he could not prejudice the tenant's eſtate: the freehold, therefore, paſſed to the grantee, ſubject to the copyholder's claim: Now by the act of forfeiture that claim was immediately at an end; and conſequently, the grantee would be entitled to enter (*e*).

"Regularly, it is true," ſays Sir *Edward Coke* (*f*), "that none can take benefit of a forfeiture but he that is lord at the time of the forfeiture:" And in order to aſcertain who may enter for a forfeiture committed before his own time, we muſt diſtinguiſh between the caſes in which the lord takes, *firſt*, by way of remainder; *ſecondly*, by deſcent; and, *thirdly*, by the grant of the preceeding lord.

Thus if there be tenant for life of a manor with remainder over to a ſtranger in fee, and a copyholder commit waſte, and then the tenant for life die, before entry; he in remainder may, it is ſaid, enter; for he had an intereſt in the

(*e*) *Co. Copyh. f.* 60. *Tr.* 140. 1 *Roll. Abr.* 509, 510. *Copyh.* (G) *pl.* 3. & 4. *Eaſt & Hardinge.*

(*f*) *Co. Copyh. f.* 60. *Tr.* 139.

manor at the time of the forfeiture committed, though he could not enter by reaſon of the eſtate in the tenant for life; but which being determined, his entry is now accrued for the forfeiture committed in the life of the tenant for life (*g*).

If the act of forfeiture be ſuch as to work a diſinheriſon to the lord, as if the eſtate be deſtroyed, as in caſe of feoffment, fine, or recovery, the heir of the lord in whoſe time it occurred ſhall take advantage of it: but not otherwiſe (*h*).

And as to the alienee, grantee, or leſſee, of the manor, it ſhould ſeem that he cannot take advantage of a forfeiture which accrued before his own time, even in the caſe of diſheriſon (*i*).

But if a copyholder, holding of a manor belonging to a biſhoprick, commit a forfeiture, as by felling timber, during the vacancy of the ſee,

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(*g*) *Co. Copyh. ſ.* 60. *Tr.* 139. but ſee *Cro. Jac.* 301. *Lady Montague*'s caſe, *contra.*

(*h*) See 3 *Durnf. & Eaſt*, 162. *Doe* d. *Tarrant* v. *Hellier. Freem.* 516. *Ca.* 692.

(*i*) *Co. Copyh. ſ.* 60. *Tr.* 139. 2 *Vent.* 38, 39. *Lord Cornwallis*'s caſe.

the

the ſucceeding biſhop may bring ejectment (*k*). This caſe, however, differs from the preceeding; in thoſe there was a lord at the time of the forfeiture who might have taken advantage of it if he pleaſed; but, in the preſent caſe, there was no one to whom laches could be imputed.

If there be ſeveral coparcenors of a manor, and a forfeiture incur, and one die before entry, the others, it is ſaid, cannot enter (*l*). So when the cauſe of forfeiture deſcends to coparceners, they muſt all agree as to taking the advantage of the forfeiture, or one alone ſhall not be permitted to enter: So, if one die, the other cannot ſeize (*m*).

How, and at what time a forfeiture is to be taken advantage of.

Whatever may be the act of the copyholder, yet, in order to remove the eſtate out of him, the lord muſt actually avail himſelf of the forfeiture by ſeizing into his hands (*n*) the tenements forfeited, by the entry (*o*) of himſelf, or

(*k*) *Bull. Niſi Prius.* 107. *Read* v. *Allen*, cited.

(*l*) See 1 *Freem.* 516. *ca.* 692.

(*m*) *Ibid.* and 1 *Salk.* 186. *Eaſtcourt* & *Weeks.*

(*n*) *Gilb. Ten.* 247. 2 *Show. Rep.* 152. *Benſon* & *Strode.* 3 *Durnf.* & *Eaſt*, 173. *Doe* d. *Tarrant* v. *Hellier.*

(*o*) In the caſe of *Tarrant* & *Hellier*, (3 *Durnf.* & *Eaſt*, 172-3.) the Court ſeemed to think that the lord could not enter for a forfeiture after twenty years.

agent

agent, as his bailiff, &c. (*p*), or by the exertion of ſome act of ownerſhip which may be tantamount to ſuch ſeiſure, as by granting them again for years (*q*).

In many caſes the lord may enter immediately into the lands without the intervention of a preſentment of the forfeiture; in others a regular preſentment is previouſly requiſite, or, at leaſt, adviſable.

Where the offence which is the cauſe of forfeiture is, in its very nature, apparent and notorious, and ſuch as by common preſumption the lord cannot avoid noticing (*r*), no preſentment can be neceſſary, as a preſentment is only for his inſtruction (*s*).

If a perſon, therefore, be attainted of treaſon or felony, the lord may ſeiſe without any preſentment by the homage; ſince the commiſſion of the offence is aſcertained and made of publicity by his conviction in a Court of law (*t*).

(*p*) See 2 *Show.* 152. *Benſon* & *Strode.*

(*q*) See 1 *Levinz.* 26. *Miliſax* v. *Baker.*

(*r*) See *Co. Copyh. ſ.* 57. *Tr.* 131.

(*s*) Sir *T. Jones* 190. *Beniſon* & *Strode*, and ſee *ante* p. 79. &c.

(*t*) *Benſon* & *Strode*, *ubi ſup.* 2 *Vent.* 38. Lord *Cornwallis*'s caſe.

So

So if the forfeiture be in conſequence of any act or refuſal in the preſence of the lord, as in open Court, no preſentment can be requiſite; as the end of preſentment is already anſwered. Thus if proclamation be made for an heir to claim, and no claim be made: If a copyholder be perſonally warned to do ſuit at a particular Court, and he does it not; or if he appear in Court and openly and abſolutely refuſe to be ſworn on the homage, according to the cuſtom, or the like (*u*), a preſentment muſt be evidently nugatory.

But when the cauſe of forfeiture is ſuch that by common preſumption the lord cannot have notice (*w*), a preſentment ſhould be made to appriſe and inform him of it: However, it does not appear that, even in this caſe, it is any ways of neceſſity. A preſentment is, as we have ſeen, only the mean of information as to the lord: if the circumſtance be already known to him any further mean of inſtruction muſt be needleſs. If he, therefore, is aware of the event of which a forfeiture would be the conſequence, he may avail himſelf of it without a preſentment. Still, however, it is prudent and adviſable to preſent ſuch event in open Court, that the matter may be apparent to others; and for the ſatisfaction of the remaining tenants, as well as a ſanction to the lord.

(*u*) See 2 *Keb.* 451. *Jory & Pawly. Co. Copyh. ſ.* 57.
(*w*) See *Co. Copyh. ſ.* 58. *Tr.* 135.

If

If a copyholder commit treaſon or felony, and be attainted, the lord may ſeiſe, we have ſeen, without any preſentment. In this caſe the fact is aſcertained and notorious. But the lord, it is ſaid, is not juſtified in ſeiſing before attainder without a ſpecial cuſtom empowering him ſo to do; as it would be unreaſonable and inconvenient to permit a capital crime to be tried or controverted in a civil action before the conviction appeared upon record (*x*).

If the commiſſion of ſuch crime be preſented by the homage before the ſuppoſed offender be regularly convicted by due courſe of law, and the lord, in conſequence, ſeiſe, as authorized by ſuch ſpecial cuſtom, and afterwards the tenant be legally acquitted, the forfeiture ſhall be diſcharged (*y*): and ſo alſo it is ſaid: if, after conviction, *he have his clergy* (*z*).

But if he be attainted *and pardoned*, the forfeiture ſhall not be purged (*a*); ſince the pardon

(*x*) 2 *Vent.* 38. *Lord Cornwallis's* caſe. 2 *Hawk.* P. C. *ch.* 49. *ſ.* 7.

(*y*) See *Godb.* 267. *Paginton & Huct.* 2 *Keb.* 466-7. *Jory & Pawly.*

(*z*) See 2 *Keb.* 446-7. *Jory & Pawly.* 1 *Lev.* 263. S. C. But if there be a cuſtom to ſeiſe on conviction, the forfeiture ſeems complete; and if the lord ſeiſe, can the premiſes be diveſted by the allowance of clergy? See 2 *Hawk.* P. C. *ch.* 33. *ſ.* 129. and 4 *Bl. Comm.* 373*. *c.* 28. And therefore *quære* as to the caſe of *Jory* v. *Pawly*, as to this point.

(*a*) 2 *Show. Rep.* 150, &c. *Benſon & Strode. Sir T. Jones* 189. S. C.

neceſſarily

neceſſarily confeſſes his guilt which was the cauſe of forfeiture; and the king cannot remit the claims of the lord.

And before we diſmiſs this ſubject, we may obſerve that forfeitures are always odious in the eſtimation of the law (*b*); and, on litigation, the Courts demand the moſt direct and certain proof of the cauſe of forfeiture, on the part of the lord, before they countenance his ſeiſure (*c*).

We have already obſerved that, although the copyholder commit any act which may be the cauſe of forfeiture, yet the eſtate is not out of him till the lord actually ſeiſe. If the lord, therefore, exert not his right, does not inſiſt on, and abſolutely avail himſelf of the forfeiture, the copyholder will ſtill remain tenant of the premiſes. The lord, if he pleaſes, may wave the forfeiture: and if he does any thing which may amount to an acknowledgment of an exiſting tenancy, or confirm the eſtate, after notice of the forfeiture, he ſhall be for ever precluded from taking advantage of the event. Diſpenſation.

Any perſon who is lord by right, who might have taken advantage of a forfeiture, may diſpence with it, though he be but a tenant at will; Who may diſpence.

(*b*) *Watk.* N. XCIX. to *Gilb. Ten.* 441.

(*c*) 1 *Bulſt.* 190. *Hamlen* v. *Hamlen.*

and

and it ſhall be a diſpenſation not only as to himſelf, but as to him in reverſion alſo. But a lord by wrong, as a diſſeiſor, cannot purge a forfeiture as to a rightful lord (*d*).

Notice.

But we muſt be mindful that, in order to effect a diſpenſation, *the lord muſt have notice of the forfeiture*; for if the cauſe of forfeiture be unknown to him he ſhall not be precluded by his ſubſequent act from availing himſelf of it (*e*).

What acts may be diſpenced with.

As to what cauſes of a forfeiture may be diſpenced with, we may remark, with *Sir Edward Coke* (*f*), that ſome make a difference between thoſe forfeitures which tend to the deſtruction of the copyhold, and thoſe which do not: As if the copyholder make a feoffment; "by this the copyhold is deſtroyed; and therefore, no ſubſequent acknowledgement of the lord," ſays he, "will ever ſalve this ſore."

A feoffment operates immediately by livery, and works a diſſeiſin. *It binds even the lord till it be defeated by an act of equal notoriety.* But it has been determined (*g*) that *a fine* levied

(*d*) 1 *Lev.* 26. *Miliſax* v. *Baker.*

(*e*) *Cro. Car.* 233. *Mathews* v. *Whetton.* 1 *Roll. Abr.* 475. *Confirmation* (C) *pl.* 1. *Co. Copyh. ſ.* 61. *Watk. Gilb. Ten.* 247-8.

(*f*) *Co. Copyh. ſ.* 61.

(*g*) 3 *Durnf. & Eaſt*, 162. *Doe* d. *Tarrant* v. *Hellier.*

by

by a copyholder may be waved, as the cauſe of forfeiture, as *the fine would be void againſt the lord, the copyholder continuing in poſſeſſion.* Theſe caſes, therefore, eſſentially differ.

If a copyholder be attainted of treaſon or felony, perhaps no diſpenſation could take place. By the attainder the tenancy is abſolutely at an end; and the copyholder is dead in law (*k*). Though diſpenſation is much favoured: However, in this caſe, if the lord does not wiſh to avail himſelf of the forfeiture it would be adviſable to make a new grant to the copyholder, if pardoned, or to his deſcendants, if not.

Other acts, however, which go not to the deſtruction of the copyhold, or the utter incapacity of the tenant, may be diſpenced with by the lord: as waſte, non-admiſſion, ſubtraction of ſuit or ſervices, or the like.

What ſhall be a diſpenſation.

And any act of the lord, after forfeiture, (*the lord being apprized of ſuch forfeiture*) whereby he acknowledges the copyholder as his tenant ſhall be a diſpenſation (*i*). As if the anceſtor be preſented as dying ſeiſed, and proclamation be made for the heir to claim, though no actual admiſſion take place (*k*).

(*h*) See *Sir T. Jones* 189. *Benſon* v. *Strode.*

(*i*) *Co. Copyh. ſ.* 61. *Gilb. Ten.* 247-8.

(*k*) 3 *Durnf. & Eaſt*, 162, &c. *Doe* d. *Tarrant* v. *Hellier.*

So

So if he admit him after forfeiture (*l*): if the lord accept rent (*m*), or other ſervices (*n*); if he amerce him for default of ſervice (*o*); or diſtrain on the lands for rent (*p*); it ſhall be a diſpenſation of the forfeiture.

Relief in equity.

If a copyholder does any act which would be a forfeiture at law, he ſhall, in certain caſes, find relief in equity, and the lord be prevented from taking advantage of ſuch act.

But equity will not relieve againſt a voluntary act; nor unleſs a compenſation can be made to the lord (*q*).

But where waſte has been inadvertently done (*r*), or done by a ſtranger (*s*); or fines or rents

(*l*) *Ibid*, 1 *Lev*. 26. *Miliſax* v. *Baker*.

(*m*) 1 *Salk*. 186. *Eaſtcourt* & *Weeks*. 1 *Keb*. 15. *Garrard* & *Lyſter*. *P. Twiſden*. See *Gilb. Ten*. 334.

(*n*) See *Gilb. Ten*. 247-8.

(*o*) 1 *Leon*. 104. *Sir John Braunche*'s caſe.

(*p*) *Co. Copyh. f*. 61.

(*q*) *Preced. in. Chanc*. 568. *Sir H. Peachy* v. *Duke of Somerſet*. *Str*. 447. S. C. 6 *Vin*. 113. (D *c*.) *pl*. 9. S. C. 2 *Freem*. 137. *ca*. 170. *Biſhop of Worceſter* v.———

(*r*) See 2 *Vern*. 537. *Naſh* v. *Com. Derby*. *Prec. Chanc*. 574.

(*s*) *Toth*. 237-8. *Taylor* v. *Hoot*, cited *Vin*. 152. *Copyh*. (E. d.) *pl*. 2.

have

have been unpaid (*t*); Chancery has relieved.

So in cases where the act of the tenant was in itself indifferent, though amounting to a forfeiture at law; as where a quaker refused to take the *oath* of fealty (*u*).

(*t*) See 2 *Str.* 453. *Prec. Chanc.* 572.

(*u*) See *Prec. Chanc.* 574. *Edmore & Craven*, and 2 *Vern.* 694. *Cox* v. *Higford.*

CHAP. IX.

Of EXTINGUISHMENT AND SUSPENSION.

What.

WHEN a freehold and a copyhold intereſt in the ſame premiſes unite in the ſame perſon and in the ſame right, the copyhold intereſt becomes extinguiſhed; but if they are veſted in the ſame perſon in different rights, the copyhold intereſt is ſuſpended only.

The freehold and copyhold intereſts muſt be of the ſame premiſes.

And, firſt, in order to effect an extinguiſhment, "the freehold and copyhold intereſts (*w*) muſt be of *the ſame premiſes:*" for if *A.* be tenant by copy of *White Acre*, and the lord enfeoff him of *Black Acre*, the tenure of *White Acre* will not be extinguiſhed, as *A.* may hold the one by copy and the other by deed.

But they need not be commenſurate nor *confined* to the ſame premiſes.

But the intereſts need not be commenſurate with each other, nor be confined to the ſame premiſes, ſo the ſame premiſes be included in both tenures.

(*w*) A copyholder may be the *bailiff* of the manor; for a bailiff has *no intereſt*; and, conſequently, the copyhold would not be extinguiſhed. See *Cro. Jac.* 177. *in Gybſon & Stark.*

Thus

Thus if *A.* be a copyholder in fee and accept a common-law leaſe for years of the premiſes, (*x*) or a leaſe for years of the entire manor (*y*), his copyhold intereſt will be extinguiſhed. Leaſe for years.

Or if *A.* be leſſee of the manor, and *B.* a copyholder in fee, and *B.* bargain and ſell his copyhold to *A.* and his heirs, the copyhold intereſt ſhall be extinguiſhed for ever (*z*).

Again, if a copyholder in fee in poſſeſſion purchaſe the reverſion of the manor it will be a preſent extinguiſhment; and the particular tenant of the manor may enter into the copyholds premiſes immediately on the transfer of the reverſion (*a*). Reverſion.

If a copyholder be ſeiſed in tail and take a grant of the manor, the copyhold intereſt, though in tail, will be extinguiſhed: for when the intereſt of the lord of the manor is united with the copyhold in tail there muſt be a merger (*b*). Eſtate tail.

(*x*) 1 *Brownl.* 32. 4 *Co.* 31. *a.*

(*y*) *Moore* 185. *pl.* 330. which alſo cites *Hide* & *Newport* as ſo adjudged, and ſo alſo in 4 *Co.* 31. *b.* *Frenche's* caſe.

(*z*) *Hutt.* 65. *Blemmerhaſſett* v. *Humberſtone.* *Sir W. Jones,* 41. S. C. *Godb.* 101. *ca.* 117. and ſee N. (4.) to *Co. Litt.* 59. *a.* *Hale's* MSS.

(*a*) *Calth.* 97.

(*b*) 2 *Veſ. Junr.* 525. *Challoner* v. *Murhall,* and *ante ch.* 4. *p.* 226. Of Entails.

Defeaſible eſtate.

And whenever the intereſts become united the extinguiſhment is complete; and although the eſtate of freehold be defeated, the copyhold intereſt cannot poſſibly revive, as by the extinguiſhment it was utterly at an end. Thus if the copyholder be enfeoffed on condition, and the condition be broken and the lord enter, the copyhold intereſt is abſolutely gone (*c*).

Leaſe of the whole manor.

Again, it is not requiſite that the intereſt be confined to the ſame premiſes, ſo the ſame premiſes be included in both tenures. If the tenant of one acre by copy take a leaſe of the whole manor, it will be an extinguiſhment of the copyhold tenure as to that acre; for the freehold of that acre was included in the manor (*d*).

Joint tenancy.

So if he purchaſe the manor to hold to himſelf and another in joint-tenancy, the copyhold will be extinguiſhed; for each joint-tenant is ſeiſed *per mie et per tout* (*e*).

The intereſts muſt be united in the ſame perſon;

Secondly, "The intereſts muſt be united *in the ſame perſon:*" for while they continue ſeparate no extinguiſhment can take place.

If *A.* therefore, hold one hundred acres by copy, and the lord grant the freehold of thoſe

(*c*) See 4 *Co.* 31. *a.*

(*d*) See *ante* laſt page; and ſee alſo 2 *Veſ. Junr.* 524. *Challoner* v. *Murhall.*

(*e*) *Calth.* 97.

acre

acres to *B.* the intereſt of *A.* will not be, in conſequence, extinguiſhed (*f*), though *B.* was enfeoffed to the uſe of *A.* (*g*).

But if *B.* afterwards convey the freehold to *A.* an extinguiſhment would be effected; as the intereſts would be no longer diſtinct (*h*).

If a copyhold be granted to *A. B.* and *C. ſucceſſive*, *i. e.* to *A.* for life, remainder to *B.* for life, remainder to *C.* for life, and *A.* take a leaſe of the lands by deed, it will, it is ſaid, be only an extinguiſhment of *his* eſtate for life (*i*), ſince that eſtate, only, they affirm, is united with the eſtate by deed. The eſtates in remainder are in other perſons; and if *A.* were permitted to defeat them by his own act it would be attended with manifeſt injuſtice. The argument of the late *Lord Chief Baron Gilbert* (*k*) does not ſeem concluſive againſt the doctrine of the caſe now under remark, as the remainders were evidently *veſted* remainders; and, conſequently, the mere deſtruction of the eſtate limited to *A.* could not in itſelf deſtroy the remainders over. Should the leaſe be determined during the life

(*f*) 4 *Co.* 24. *b. Murrell & Smith.*

(*g*) *Cro. Jac.* 573. *Waldoe* v. *Bartlet. Hob.* 181. *Howard* v. *Bartlet.* 2 *Roll. Rep.* 178. *Walter* v. *Bartlet.*

(*h*) 2 *Co.* 16. *b. Lane's* caſe.

(*i*) 2 *Leon.* 72. *Curtis* v. *Cottel.*

(*k*) *Ten.* 303.

of *A.* he could never reclaim his copyhold intereſt, as it became wholly extinct on his acceptance of the eſtate by deed; but on his *death*, though not before (*l*), *B.* if in exiſtence may enter.

And in like manner, if a copyholder in fee ſurrender to the uſe of the lord for life, with remainder over to a ſtranger, or reſerving the reverſion to himſelf, it will only be an extinguiſhment of the eſtate ſo limited to the lord; for that limited to the ſtranger or reſerved to the ſurrenderor will not be deſtroyed (*m*).

and in the ſame right.

Suſpenſion.

Thirdly, "the intereſts muſt be united in the ſame perſon *in the ſame right:*" for otherwiſe the copyhold intereſt will be ſuſpended only.

If, therefore, a perſon have a copyhold intereſt in his own right, and a freehold intereſt either in the particular premiſes or in the manor generally, in the right of another, or *vice verſa*, the copyhold intereſt will be only ſuſpended while both intereſts continue in the ſame perſon.

Thus if a copyholder marry a feme ſeignioreſs, the copyhold will only be ſuſpended during coverture (*n*).

(*l*) See *ante chap.* 5, on Remainders, *p.* 192, &c. 197.

(*m*) See *Co. Copyh. ſ.* 34. *Tr. p.* 72.

(*n*) *Co. Copyh. ſ.* 62. *Tr. p.* 142. *Cro. Eliz.* 8. *ca.* 1. *Anon.*

So

So if the lord marry a feme copyholder, the copyhold tenure will be ſuſpended: but if he alien the manor, or die, the copyhold tenure will revive.

How the intereſts may be united.

We will now proceed to enquire into the means by which ſuch an union of the different intereſts may be effected; and this divides itſelf into two branches: the firſt is when the copyhold intereſt comes to the freehold; and the ſecond when the freehold comes to the copyhold intereſt.

By the copyhold coming to the lord.

As by releaſe, ſurrender, &c.

If the copyholder, therefore, *releaſes* to the lord (*o*), or ſurrenders expreſsly to his uſe (*p*), or without declaring any uſe (unleſs there be any thing further to rebut the preſumption), (*q*) or if he does any other act which indicates a determination to relinquiſh his tenancy, as if he bargain and ſell to his lord (*r*), or reſign, or renounce his eſtate (*s*), the copyhold tenure will be extinct. For ſo ſoon as the relinquiſhment is effected, ſo ſoon muſt the copyhold intereſt be at an end; as a perſon cannot hold of himſelf, and be at one and the ſame time both tenant and lord.

(*o*) See *Gilb. Ten.* 300. *Hutt.* 65. Sir *W. Jones* 42.

(*p*) See *anté ch.* 3. *p.* 75. 92.

(*q*) See *ante ch.* 3. *p.* 92. 109.

(*r*) *Blemmerhaſſett* v. *Humberſtone*, *ubi ſup.*

(*s*) *Calth.* 58, and *ante p.* 54, &c. *ch.* 3.

Forfeiture or eſcheat.

Again, if the lands which were held by copy eſcheat or become forefeited to the lord, the copyhold tenure muſt be, in conſequence, extinguiſhed; as the lands then fall into the manor; and there can be no one to hold by copy till the lands be ſo granted by copy again (*t*).

By the freehold coming to the copyholder.

Secondly, an extinguiſhment will be equally cauſed by the copyholder acceding to the freehold intereſt. If he accept, either mediately or immediately, a leaſe or feoffment of the freehold of the lands ſo held by copy, or of the manor generally, the copyhold intereſt will be utterly extinct (*u*). And ſo alſo if he take the manor by deſcent.

Obſervation.

It is frequently ſaid in our books that if a copyhold eſcheat and the lord afterwards leaſe the lands ſo eſcheated for years by deed, the copyhold will be extinguiſhed for ever. But this mode of expreſſion is inaccurate. The copyhold was equally extinguiſhed before as after the leaſe. It was extinguiſhed by the very act of eſcheating. The moment it fell into the manor the extinguiſhment was completed. The leaſe by deed would, it is true,

(*t*) If one having a manor, deviſe it, and afterwards a tenancy eſcheat, *that alſo* ſhall paſs by the deviſe as being part of the manor. 1 *Salk.* 238. Admitted in *Bunter* v. *Coke*.

(*u*) 4 *Co.* 31, *a.* & *b.* *Frenche's* caſe. 2 *Co.* 16. *b.* *Lane's* caſe.

prevent

prevent the lands from being ever granted by copy again: but the extinguiſhment was wholly independant of ſuch event. The leaſe is a deſtruction of the demiſable quality of the lands; but it cannot operate as an extinguiſhment of that which had ceaſed to exiſt before the leaſe had a being. From the very inſtant the eſcheat took place the copyhold tenure was no more. A new grant by copy might have been made; but the old one was utterly and abſolutely at an end. We ought not, therefore, to ſay that ſuch a leaſe operates as *an extinguiſhment*, but as *a deſtruction of the demiſable property in the lands*.

CHAP.

CHAP. X.

Of ENFRANCHISEMENT.

Defined.

ENFRANCHISEMENT is "the changing of the *tenure* from baſe to free;" and is effected by "the lords conveying to the tenant the freehold of the particular and ſpecific premiſes which were held by copy, or by releaſing to the tenant his ſeigniorial rights."

Conveyance of the freehold to the tenant by the lord.

Firſt, then, it is effected "by the conveyance of the *lord* to the tenant" For if the tenant convey or releaſe his intereſt to the lord, it will not be an enfranchiſement but an extinguiſhment (*w*) of the copyhold. The lord had the freehold already in him, and the copyhold is now no more: no enfranchiſement can, therefore, take place, as the tenure of the lord was already free.

But it is not eſſential that the conveyance of the freehold to the tenant be made *immediately* from the lord; for if the lord convey the freehold to a ſtranger, and the ſtranger convey it to the copyholder, the baſe tenure will be deſtroyed (*x*).

(*w*) See *ante ch.* 9. Of Extinguiſhment.

(*x*) See *Lane's* caſe, 2 *Co.* 16. *b.*

The

The lord, in order to enfranchiſe abſolutely, muſt be enabled to convey the fee ſimple of the freehold intereſt; for otherwiſe it will be only an extinguiſhment of the copyholders intereſt, and a ſuſpenſion of its demiſable property during the exiſtence of the eſtate ſo conveyed in the freehold. Who may enfranchiſe.

A lord, therefore, having only a partial intereſt in the manor, cannot enfranchiſe in fee. He can only communicate what he has himſelf; and his act ſhall not injure the rights of others, any more than perſons having ſuch partial intereſt can, by their own act, abſolutely deſtroy the demiſable property of the copyhold.

Thus if a lord be tenant for years, life, or in tail, and a copyhold eſcheat, and he make a leaſe for years at common law, it will not deſtroy the cuſtom to regrant by copy only as to his own intereſt: the reverſioner may grant it by copy again (*y*).

Secondly; The conveyance muſt be "*to the tenant.*" For ſhould the lord convey the freehold of the premiſes to a ſtranger, it would be no enfranchiſement of the copyhold, nor ſhould The conveyance muſt be to the *tenant.*

(*y*) 2 *Roll. Abr.* 271. Preſcription (*T*) *pl.* 1. 4. *Ruſley & Coneſby. Cro. Eliz.* 459. S. C. by the name of *Coneſbie & Ruſky.*

it

it even operate as an extinguiſhment (z): as the act of the lord alone ſhall not prejudice the copyholder's eſtate (a).

By the conveyance of the freehold the premiſes were ſevered from the manor, and, by conſequence, muſt be held of the lord above. Should the grantee convey the freehold over to the copyholder the copyhold tenure would be extinct, as its exiſtence would be incompatible with the freehold intereſt. Both tenures could not ſubſiſt together, and, by conſequence, the leſs worthy would merge; the baſe would be abſorbed in the free.

Tenant having a partial intereſt.

We have ſeen that if the lord have only a partial intereſt he cannot enfranchiſe in fee; but if the copyholder have only a particular eſtate in the premiſes and he take a conveyance of the freehold in fee, it ſhall be an abſolute enfranchiſement; the copyhold tenure ſhall be extinct for ever. But the enfranchiſement ſhall be for the benefit of thoſe in remainder, who

(z) Though the freehold be granted to a ſtranger *in truſt for the copyholder*. *Hob.* 181. *Howard* & *Bartlet*. *Cro. Jac.* 573. *Waldoe* & *Bartlet*. 2 *Roll. Rep.* 178. *Walter* & *Bartlet*.

If the copyholder be enfeoffed to the uſe of others, the copyhold is preſerved by the ſaving in the ſtat. 27 of *Hen.* 8. 7 *Co.* 38. *a*. *Iſed*'s caſe cited as ſo reſolved.

(a) 4 *Co.* 24. *b*. *Murrel* & *Smith*. *Cro. Jac.* 573. *Waldoe* & *Bartlet*.

would

would have taken the copyhold intereſt had the enfranchiſement never taken place, as well as for that of himſelf; and a Court of Equity will, accordingly, direct a conveyance from the heirs at law of the particular tenant to him in remainder, on his paying a proportionate part of the conſideration advanced for the enfranchiſement (*b*).

Thirdly; It is "the conveyance of the *freehold*:" for the transfer of the *freehold* is of the very eſſence of enfranchiſement. The freehold muſt be conveyed.

As the ſeparation of the freehold and copyhold intereſts in the ſpecific premiſes is abſolutely requiſite to the very exiſtence of the copyhold tenure, ſo the conveyance of the freehold to the copyhold intereſt is neceſſary to enfranchiſe the premiſes.

When, therefore, it is intended to enfranchiſe a copyhold, ſuch mode ſhould be adopted as will convey the freehold of the premiſes: as a feoffment, bargain and ſale, or the like. Though the releaſe by the lord of the ſeigniorial rights will equally effect an enfranchiſement, as we ſhall preſently ſee. Modes of enfranchiſement.

Fourthly; The conveyance muſt be of the freehold "*of the particular and ſpecific premiſes which were held by copy.*" The freehold conveyed muſt be of the very lands held by copy.

(*b*) 1 *Brown. Ch. Caſ.* 515. *Wynne & Cookes.* 2 *Veſ. Junr.* 524. *Challoner & Murhal.*

For

For if the *whole manor* deſcend or be conveyed to the copyholder it will not be properly an enfranchiſement of the copyhold, but an extinguiſhment of it; and the premiſes may be granted by copy again.

By the conveyance of the freehold of the ſpecific lands they become ſevered from the manor but it is otherwiſe when the *whole manor* is conveyed. In the latter caſe the freehold is not affected; and the copyhold tenure is only extinguiſhed by reaſon of the impoſſibility of the ſame perſon's being tenant and lord. The lord cannot hold of himſelf (*c*). The copyhold tenure, therefore, which before ſubſiſted is gone, but no alteration takes place as to the freehold tenure. The tenure, as to the lord above, remains as before; and the lands may be regranted by copy.

Releaſe by the lord of his ſeigniorial rights.

Again; an enfranchiſement may be effected "by the lord's releaſing to the tenant his ſeigniorial rights."

By the releaſe, the tenure between the copyholder and the lord of whom he held by copy is extinguiſhed; the premiſes are ſevered from the manor. The releaſee muſt, therefore, neceſſarily hold of the lord above, as he muſt hold of ſomebody; and, agreeably to the well known rule of law, he muſt hold of the lord above by the ſame

(*c*) See *ante ch.* 6. Of Admiſſion. *p.* 280.

ſervices

ſervices as the meſne had held. Now the meſne, if we may ſo call him, held the premiſes of which he releaſed his ſeigniorial rights by frank-tenure, and not by copy; and, of conſequence, the releaſee muſt now hold by frank tenure alſo (*d*).

The tenure was often changed by the releaſe of the lord (*e*): and in the preſent caſe, the copyholder, being tenant at will to the lord, there was a privity between them; and, conſequently, the releaſe of the lord to the copyholder would enlarge his eſtate and paſs the freehold of the premiſes (*f*).

Conſequence of enfranchiſement.

We come now to the conſideration of the conſequences of enfranchiſement.

Separation from the manor.

Immediately on the lands being enfranchiſed in fee, they become ſevered from the manor, and held of the lord above under the ſame tenure and ſervices as the former or meſne lord held.

Tenure.

The tenure, therefore, being extinct as to the enfranchiſing lord, he cannot, conſequently, reſerve to himſelf any ſervices on ſuch enfranchiſement. He has no reverſion in himſelf; he cannot reſerve a right of eſcheat. If any yearly or other payments are to be made by the tenant

Services.

(*d*) And ſee *Litt. ſ.* 147. and *Co. Litt.* 102. *b.*

(*e*) *Paſchæ* 49 *Ed.* 3. *pl.* 2. *fol.* 10. *b.* 2 *Inſt.* 502.

(*f*) See *Litt. ſ.* 460. and *Co. Litt.* 270. *b.*

after

after enfranchiſement they may be good as rents-charge or ſeck, or obligatory on the tenant on his ſpecial covenants; but they cannot be good as *ſervices* or *renders* in conſequence of tenure, ſince the tenure which ſubſiſted between them is utterly at an end (*g*).

Cuſtoms. Again; as the premiſes are abſolutely ſevered from the manor and the tenure changed into frank-fee, all cuſtoms which attached to copyhold tenure within the manor of which they were before held, muſt, of neceſſity, have ceaſed with reſpect to them.

Deſcent. Thus if the cuſtom be that the lands held by copy ſhould deſcend to the youngeſt ſon, ſuch cuſtom would no more attach. Since the cuſtom was that all "*copyholds within the manor*" ſhould ſo deſcend. Now, on enfranchiſement, the premiſes are neither "*copyhold*" nor "*within the manor*;" and, conſequently not within the cuſtom (*h*).

Common. So all rights and privileges annexed to the copyholder's eſtate, as ſuch, muſt alſo be done

(*g*) *Mich.* 21 *Ed.* 4. *pl.* 32. *fol.* 62. *a.* 4 *Durnf.* & *Eaſt*, 443. *Bradſhaw* v. *Lawſon.* 2 *Ibid.* 705. *Townley* v. *Gibſon.* The caſe in *Moore* 143. *Griffith* v. *Clarke*, ſeems to have been an alienation *before* the ſtat. of *Quia Emptores*.

(*h*) In the caſes of *Murrel* & *Smith*, (4 *Co.* 24. *b.*) and *Beale* v. *Langley*, (2 *Leon.* 208.) the freehold was merely ſevered from the manor by grant to a ſtranger; the *copyhold intereſt* remained. *No enfranchiſement*, therefore, took place; and, conſequently, thoſe caſes do not apply.

away;

away; as the eſtate by copy to which they attached has ceaſed to exiſt: thus if a copyholder has common of paſture or eſtovers in right of his copyhold, and the copyhold be enfranchiſed, the common is gone, ſince the copyhold is gone in the right of which it was claimed. As the eſtate is no longer copyhold, or even held of the manor, all cuſtoms relative to copyholds within the manor muſt fail as to the premiſes enfranchiſed. Such commonage will not paſs by the word "appurtenances" in the deed of enfranchiſement (*i*). The right of commonage muſt be expreſsly conveyed as a new grant (*k*). Though equity will, under certain circumſtances, decree its continuance when it would be extinct at law (*l*).

(*i*) *Moore* 667. *Fort* & *Ward. Cro. Jac.* 253. *Marſham* & *Hunter*, and ſee S. C. in 2 *Brownl.* 209. 1 *Brownl.* 173. *Lee* v. *Edwards*, and *ibid.* 220. *Maſſam* & *Hunt.* 2 *Lord Raym.* 1225. *Crowther* v. *Oldfield. Salk.* 170. & 364. S. C.

(*k*) *Moore* 667. *Fort* & *Ward.* See alſo *Cro. Eliz.* 570 *Bradſhaw* v. *Eyre*, and 794. *Worledge* v. *Kingſwell.*

(*l*) 2 *Vern.* 250. *Styant* v. *Staker.*

ENFRANCHISEMENT OF COPYHOLD PREMISES BY WAY OF BARGAIN AND SALE.

THIS INDENTURE, *&c.* BETWEEN *A. B.* of *&c.* lord of the manor of *C.* in the county of *D.* of the one part, and *E. F.* one of

 the

the copyhold tenants of the ſaid manor, of the other part: WHEREAS the ſaid *A. B.* is ſeiſed to him and his heirs of an eſtate of inheritance in fee ſimple of and in the manor aforeſaid, and the ſaid *E. F.* is ſeiſed or poſſeſſed of the meſſuage, &c. hereinafter particularly deſcribed, of an eſtate of inheritance in fee ſimple, by copy of Court roll, at the will of the lord, according to the cuſtom of the ſaid manor of *C.* (the ſaid copyhold meſſuage, &c. being within, and parcel of, the ſaid manor.) AND WHEREAS the ſaid *A. B.* hath agreed with the ſaid *E. F.* for the conſideration hereafter mentioned, to enfranchiſe the ſaid meſſuage, &c. Now THEREFORE THIS INDENTURE WITNESSETH, That, in purſuance of the ſaid agreement, and in conſideration of the ſum of, &c. The receipt, &c. He the ſaid *A. B.* HATH granted, bargained, ſold, aliened, releaſed, and confirmed, *And* by theſe preſents, DOTH, &c. unto the ſaid *E. F.* and his heirs, ALL that the ſaid meſſuage, &c. Together with all ways, waters, watercourſes, commons, &c. *And* the reverſion, &c. *And all* the eſtate, right, title, intereſt, freehold and inheritance, claim and demand whatſoever, both at law and in equity, of him the ſaid *A. B.* of, in, or to the ſaid meſſuage, &c. TO HAVE AND TO HOLD the ſaid meſſuage, &c. to him the ſaid *E. F.* his heirs and aſſigns: *To the only proper uſe and behoof* of him the ſaid *E. F.* his heirs and aſſigns for ever FREELY, clearly, and abſolutely, enfranchiſed, acquitted and diſcharged by theſe preſents, from henceforth

Recital that *A. B.* is lord of the manor and that *E. F.* holds of him by copy;

and that the lord has agreed to enfranchiſe the copyhold.

Grant of the freehold.

Free from copyhold ſervices, &c.

henceforth for ever of, and from all, and all manner of, yearly and other payments, rents, quit-rents, chief-rents, cuſtomary or copyhold rents, fines, heriots, fealty, ſuit of Court, and all other uſual or cuſtomary or copyhold payments, duties, ſervices or cuſtoms whatſoever, which by or according to the cuſtom of the ſaid manor of *C.* the ſaid meſſuage, *&c.* hereby granted, bargained and ſold, or any of them, is or are, or have or hath been, or ought otherwiſe to be ſubject or liable to, or charged with, or which otherwiſe ought to be paid, done or performed, for, or in reſpect of, the ſame meſſuage, *&c.* or any of them, or any part thereof, as copyhold, holden of, or as parcel of the ſaid manor. PROVIDED ALWAYS, and it is the true intent and meaning of theſe preſents, and of the parties hereunto, that theſe preſents or any clauſe, matter, or thing herein contained ſhall not extend or be deemed, taken or conſtrued, to extend, to enfranchiſe, or make free, the remaining, or any other parts of the ſeveral copyhold lands or tenements (not herein before granted) and now or late of him the ſaid *E. F.*; or to acquit or diſcharge the ſaid remaining or other parts from any payments, rents, quit-rents, fines, heriots, fealty, ſuit of Court or any other payments, duties, cuſtoms, or ſervices, which by or according to, the cuſtom of the aforeſaid manor, the ſaid reſpective copyhold lands or tenements, or any of them, have at any time heretofore been ſubject or liable to, or charged with, or which have been or ought to have been paid, done, or performed, for or in reſpect of

Proviſo not to enfranchiſe other copyholds.

Grant of common.

the ſaid reſpective lands or tenements, as copyhold and parcel of the ſaid manor. AND THIS INDENTURE FURTHER WITNESSETH, That, it being the intention of the parties hereto that the ſaid *E. F.* and his heirs ſhould for ever uſe and enjoy the ſame commonage in and upon all and every the waſtes, commons and commonable lands of, or belonging to the ſaid *A. B.* as lord of the ſaid manor of *C.* notwithſtanding the enfranchiſement of the ſaid meſſuage, &c. as he the ſaid *E. F.* heretofore hath been, and now is, entitled to by reaſon of the ſaid copyhold premiſes intended to be hereby enfranchiſed, and to the end that ſuch commonage may be the more effectually ſecured and conveyed to the ſaid *E. F.*, *He* the ſaid *A. B.* DOTH, for the conſiderations aforeſaid, and in performance of the ſaid agreement, grant and confirm unto him the ſaid *E. F.* and his heirs, *All* commonage, right and title of common, of what nature ſoever of, in, upon, to, or out of all and every the waſtes, commons, and commonable lands of, or belonging to him the ſaid *A. B.* as lord of the ſaid manor of *C.* as aforeſaid, whatſoever and whereſoever, which, and in as large and beneficial a manner to all intents and purpoſes, as he the ſaid *E. F.* could have exerciſed, claimed or demanded, or in any wiſe have been entitled to, as a copyhold tenant, owner or occupier, of the ſaid meſſuage, &c. if theſe preſents had not been made. (*Then follow the uſual covenants of title.*)

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